

No. 2456

IN THE
United States Circuit Court of Appeals
NINTH CIRCUIT

CHARLES EDWARD GRELLÉ AND THE INDEPENDENT
FOUNDRY COMPANY, a corporation,
Appellants,

vs.

THE CITY OF EUGENE, OREGON, AND M. F.
GRIGGS,
Appellees.

Appeal from the District Court of the United
States for the District of Oregon.

TRANSCRIPT OF RECORD.

Filed

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F. D. Monckton,
Clerk.

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Appellants,

vs.

THE CITY OF EUGENE, OREGON, AND M. F. GRIGGS,

Appellees.

**Names and Addresses of Solicitors
upon this Appeal:**

For Appellants:

T. J. Geisler,

Henry Bldg., Portland, Oregon

For Appelees:

G. F. Skipworth,

Eugene, Oregon

J. M. Pipes

Portland, Oregon

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*In the District Court of the United States for the
District of Oregon.*

Be it Remembered, that on the 20 day of December, 1912, there was duly filed in the District Court of the United States for the District of Oregon, a Bill of Complaint, in words and figures as follows, to wit:

[Bill of Complaint.]

*In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE, and THE INDEPENDENT FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F. GRIGGS,

Defendants.

TO THE JUDGES OF THE DISTRICT COURT
OF THE UNITED STATES FOR THE DISTRICT OF OREGON:

The complaint of the above named plaintiffs respectfully shows:

I.

That Charles Edward Grelle, of the above named plaintiffs, is a resident of the city of Portland, in the above named district of Oregon, and that The Independent Foundry Co., the other party plaintiff, is a corporation duly organized under the laws of the state of Oregon, and has its principal place of business also

in said city of Portland and district of Oregon.

That the above named defendant, the City of Eugene, is a duly incorporated city in the state and district of Oregon, and that the defendant, M. F. Griggs, is a resident of said City of Eugene.

II.

That prior to the 2nd day of January, 1912, the plaintiff Grelle was the true, original and sole inventor of a new and ornamental design for an article of manufacture, towit: a five-light Lamp Post, a blue print of the drawing of which ornamental design is hereto attached, marked "Exhibit A" as a part of this complaint, such drawing constituting a part of the application for patent hereinafter referred to.

III.

That thereupon and about the 2nd day of January, 1912, the plaintiff Grelle duly filed in the office of the Commissioner of Patents of the United States an application, in due form, whereby he prayed for the granting of the letters patent to him on said ornamental design for the period and term of seven years, in accordance with the statutes for such cases provided.

IV.

That the said ornamental design was not known or used by others in this country before the invention thereof by the plaintiff Grelle and was not patented or described in any printed publication in this or any foreign country before the invention thereof by the plaintiff Grelle, or more than two years prior to his said application for letters patent thereon, and was

not in public use or on sale in this country for more than two years prior to his said application for patent, nor had said invention been patented in any country foreign to the United States, nor had any application for patent been filed by the plaintiff Grelle, or his legal representatives or assigns, in any country foreign to the United States prior to his said application.

V.

That thereafter, upon due proceedings had, it was duly adjudged by said Commissioner of Patents that the plaintiff Grelle was the true, original and sole inventor of said ornamental design for Lamp Post, and lawfully entitled to a patent thereon for the term of seven years, as prayed for in his said application, and thereupon such proceedings were had that on the 12th day of March, 1912, letters patent of the United States were duly issued to said plaintiff Grelle, for said new and ornamental design, said letters patent being dated the 12th day of March, 1912, and being No. 42,283, and whereby there was granted unto plaintiff Grelle, his legal representatives and assigns, the exclusive right of making, using and vending said invention throughout the United States, and the territories thereof, for the period of seven years from the date of said letters patent. That the plaintiff will produce and have ready in court the said letters patent of the United States at the hearing of this cause and as the court may direct.

VI.

That said application for letters patent of Plaintiff Grelle was intended to cover and protect, and plain-

tiffs claim that said letters patent No. 42,283 thereon issued, did relate to, cover and protect the application of said ornamental design to all types of lamp posts embodying a plurality of laterally or radically disposed arms, nevertheless the plaintiff Grelle, about the 2nd day of October, 1912, in order to specifically cover the essence and substance of said ornamental design to a five-light lamp post, (if by law required) duly filed a further application for letters patent in the office of the Commissioner of Patents of the United States, praying for the granting of letters patent to him, on such specific application of said ornamental design, for the period and term of seven years. That thereafter it was duly adjudged by said Commissioner of Patents that said plaintiff Grelle was the true, original and sole inventor of said ornamental design in its specific application for a five-light lamp post, and entitled to a patent thereon for the term of seven years, as prayed for in his said application. And thereupon such proceedings were had that on the 10th day of December, 1912, letters patent of the United States were duly issued to said plaintiff, Grelle, on said last mentioned application, said letters patent being numbered 43,338, and whereby there was granted unto the plaintiff Grelle, and his legal representatives and assigns, the exclusive right of making, using and vending the invention so patented throughout the United States and the territories thereof for the period of seven years from the date of said last mentioned letters patent. That the plaintiffs will also produce and have ready in court the last mentioned

letters patent of the United States at the hearing of this cause and as the court may direct.

VII.

That prior to the acts of defendants hereinafter complained of, the plaintiff Grelle granted unto the plaintiff The Independent Foundry Co. the exclusive license to practice said invention under said letters patents in the said district of Oregon, and other places, and said exclusive license is still in full force.

VIII.

That by virtue of said exclusive license, the said Independent Foundry Co. did equip itself to manufacture lamp posts embodying said patented ornamental design, and did extensively advertise such fact, and offer to manufacture lamp posts embodying said ornamental design for whomsoever would require the same, and that in so getting ready for the manufacture of lamp posts embodying said patented ornamental design, and advertising the same, the plaintiffs expended large sums of money.

IX.

That in seeking a market for lamp posts embodying said patented ornamental design, the plaintiffs, about October, 1911, particularly brought said invention to the notice of the Water Board of the City of Eugene, in said district, and fully disclosed said ornamental design to the officers of said City of Eugene, and in particular to its Water Board.

That plaintiffs have attached hereto, as a part of this complaint, a cut, marked Exhibit A, which cut is reproduced from the photograph taken from a lamp

post manufactured by plaintiffs, embodying said patented ornamental design, and that said photograph was taken about November 14, 1911.

That thereafter and about the early part of January, 1912, plaintiffs became apprised of the fact that said Water Board of the City of Eugene had determined to equip certain streets in said City of Eugene with lamp posts embodying said ornamental design, but that instead of giving the order for said lamp posts to the plaintiffs, said Water Board had entered into a contract with Gross Bros. Iron Works, of said City of Eugene, for the manufacture of said lamp posts.

That thereafter and about the early part of November, 1911, at the request of said Water Board, of said City of Eugene, plaintiffs sent to said Water Board a photo of a lamp manufactured by plaintiffs, The Independent Foundry Co., embodying said patented ornamental design. That said Water Board were and are the particular agents of said City of Eugene, having charge of the furnishing of light by said city to its residents. That shortly thereafter, towit: about the latter part of November, 1911, said Water Board informed the plaintiffs that they had concluded to adopt a design like that shown in the photo last referred to as furnished by plaintiffs to defendants; and the said Water Board furthermore sent plaintiffs a blue print of a drawing for lamp posts which were to be erected in said City of Eugene, also specifications of the details to be followed in the mechanical construction of such lamp posts. That a blue print of a

tracing of said blue print so furnished by said Water Board to defendants is hereby attached marked Exhibit B, as a part of this complaint, and plaintiffs allege that the ornamental design embodied in defendants said drawing of lamp post is copied from and is substantially identical with that patented to the plaintiff Grelle, as above stated.

That plaintiffs thereupon made their bid to said Water Board and informed the latter that they were prepared to make and deliver lamp posts in accordance with such bid.

That thereafter said City of Eugene, notwithstanding that its officers and agents well knew that the plaintiff Grelle was the original inventor of said ornamental design which the said Water Board desired to have copied in the lamp posts to be erected in said City of Eugene, instead of placing an order therefor with the plaintiff The Independent Foundry Co., induced a certain foundry and iron works, to wit: Gross Bros. Iron Works, located in said City of Eugene, to make for the latter lamp posts copying and infringing upon said design.

X.

That thereafter and about the 11th day of January, 1912, plaintiffs, having become apprised of the fact that said City of Eugene had determined to equip certain of its streets with lamp posts infringing said ornamental design, and for that purpose had entered into a contract with said Gross Bros. Iron Works of said City of Eugene for the manufacture of such lamp posts, the plaintiffs duly notified said City of

Eugene, in writing, through its officers, of the pendency of said application for letters patent of the United States, on behalf of plaintiff Grelle, on said Ornamental Design, and that plaintiffs would prosecute any infringers thereof as soon as letters patent on said application were issued.

XI.

That thereafter and about the 14th day of March, 1912, the plaintiffs, having ascertained that the defendants, notwithstanding said written notice and warning referred to in the preceding paragraph, had induced and procured said Gross Bros. Iron Works to manufacture for said Water Board lamp posts substantially identical with and infringing said ornamental design, and the application for letters patent of the United States on said ornamental design having in the meantime been successfully prosecuted, and the above mentioned letters patent granted thereon, plaintiffs caused the said City of Eugene to be duly notified, in writing, through its officers, of the issuance of said letters patent on said ornamental design, and plaintiffs furthermore particularly demanding by said notice that said City of Eugene desist from procuring, to be manufactured or erected in said City of Eugene, lamp posts infringing upon said patented ornamental design.

XII.

That notwithstanding said notices given by the plaintiffs to said City of Eugene, the latter, with full knowledge of all said facts, and in wilfull defiance of the rights of plaintiffs in the premises, did procure

from said Gross Bros. Iron Works lamp posts infringing said patented ornamental design, and did there upon sell one of such infringing lamp posts to M. F. Griggs, a resident in said City of Eugene, and caused the lamp post sold to said Griggs to be erected on the sidewalk in front of the premises owned or controlled by the defendant, M. F. Griggs, in said City of Eugene; and said City of Eugene did further sell and erect others of said infringing lamp posts in other places in the streets of said City of Eugene; all said acts being without the consent, and in wilfull violation of the rights, of plaintiffs in the premises. That said City of Eugene, furthermore, through its said Water Board, is now furnishing the electricity for and is lighting, maintaining, using and operating, and is profiting by the use and operation of said infringing lamp posts, without the consent, and in wilfull violation, of the plaintiffs in the premises.

XIII.

That likewise the defendant, M. F. Griggs, though possessed of full knowledge that said lamp post erected on the sidewalk in front of the premises owned or controlled by him in said City of Eugene is an infringement of said patented ornamental design of plaintiffs, and violates the rights of the latter in the premises, nevertheless is maintaining and using said lamp post without the consent, and in violation of the rights of plaintiffs in the premises.

XIV.

That plaintiffs have attached hereto, marked Exhibit C, as part of this complaint, a photographic re-

production of the particular infringing lamp post sold by said City of Eugene to the defendant, M. F. Griggs, and now erected and being used and maintained by the defendants on the sidewalk in front of the premises owned or controlled by the defendant, M. F. Griggs, in said City of Eugene, all without the consent, and in wilfull violation of the rights of plaintiffs in the premises.

XV.

That said City of Eugene is now seeking to induce other residents of its said city to purchase from it lamp posts infringing upon said patented ornamental design, and also to induce other residents of said City of Eugene to permit the latter to erect in front of their premises in said City of Eugene, and to use and maintain in use, lamp posts substantially identical with and infringing upon said patented ornamental design, in wilfull violation of plaintiffs rights in the premises.

XVI.

That mere compensation for said wrongful acts of the defendants would be wholly inadequate to the plaintiffs in the premises, for the plaintiffs desire to themselves manufacture lamp posts under said letters patent, and to this end the plaintiff, the Independent Foundry Co., as already mentioned, has made expensive patterns, and otherwise equipped itself at great expense to be ready to manufacture lamp posts embodying said ornamental design for the general public; and such equipment and enterprise of plaintiffs will be rendered wholly valueless, and the plaintiffs

irreparably injured, if the defendants, in open and wilfull violation and defiance of plaintiffs rights in the premises, be now permitted to sell and use, or even merely use lamp posts infringing upon said patented ornamental design; and that plaintiffs have no adequate and sufficient remedy in the premises, except by the process of injunction of this court, enjoining and forbidding the defendants from continuing further their said unlawful acts.

WHEREFORE the plaintiffs pray the court to grant a preliminary and also a permanent injunction directed against the defendants and each of them, their agents and employees, strictly enjoining them not to make or sell, or cause to be made or sold, or used, or maintained in use, directly or indirectly, any lamp posts infringing upon said patented ornamental design, particularly forbidding the use of said lamp post erected on the premises of the defendant, Griggs, and also enjoining the defendant, said City of Eugene, from furnishing electricity, or other lighting agent, to lamp posts erected in said City of Eugene and infringing said patented ornamental design. That plaintiffs recover from the defendant, said City of Eugene, the sum of Two Hundred and Fifty Dollars (\$250.00) as by statute provided, for each and every unlawful act of said defendants in selling lamp posts infringing upon said patented ornamental design, and that the defendant, said City of Eugene, be furthermore compelled to account for and pay over to your plaintiffs all profits which said City of Eugene has delivered or otherwise received by reason of its said

unlawful acts.

That the plaintiffs furthermore recover from the defendants, and each of them, all other and further damages which plaintiffs have sustained by reason of said unlawful acts of defendants, and that the Court, by reason of the wilfull conducts of defendants in the premises, increase the amount so ascertained three times, in accordance with the law for such cases provided.

That all lamp posts in the possession of or under the control of defendants, or either of them, be destroyed.

That the plaintiffs may have such further and other relief as to the Court may seem just and meet, and recover their costs and disbursements in this suit.

And plaintiffs further pray that the defendants may be required to make direct and perfect answers, in writing, but not under oath, according to their best knowledge, remembrance, information and belief, to the several interrogatories set forth below, that is to say:

1. The defendant, said City of Eugene, shall answer whether since the 12th day of March, 1912, it has caused to be made or delivered anywhere within the district of Oregon, particularly in said City of Eugene, lamp posts substantially embodying said patented ornamental design, or similar thereto, and if so, how many it did so make, or cause to be made, when and where the same were made, by whom they were

made, when they were delivered, giving full particulars as to each delivery made, to whom delivered, and where delivered; also stating in detail the cost of said lamp posts to the defendant, said City of Eugene, and the profits made by the latter thereon in reselling the same.

2. Whether the defendant, said City of Eugene, has erected in its said city, or is now maintaining or using therein, or is furnishing light for, any lamp posts substantially embodying said patented ornamental design, or similar thereto, and if so, that it state fully the location of each of such lamp posts, when each of said lamp posts were erected, at whose instance the same were erected, the name or names of the person controlling the premises upon which any of such lamp posts are so erected, and how, and by whom the same are now being maintained in use, stating fully all the particulars relating to the matters embodied in this interrogatory.

3. The defendant, M. F. Griggs, shall answer at whose instance the lamp post shown in the photograph Exhibit B, hereto attached, was erected, when said lamp post was erected, from whom he procured said lamp post, or who furnished the same to him, at whose cost said lamp post was erected, and if at defendant Griggs' cost, that he state the amount he paid or still owes for such lamp post, and from whom said defendant, Griggs, receives the power for lighting said lamp post; stating fully all facts in connec-

tion with each transaction referred to in this interrogatory.

THE INDEPENDENT FOUNDRY CO.,

By Charles Edward Grelle.

T. J. GEISLER,

Solicitor & Counsel
for Plaintiffs.

[Endorsed]: Bill of Complaint. Filed Dec. 20,
1912.

A. M. CANNON,

Clerk U. S. District Court.

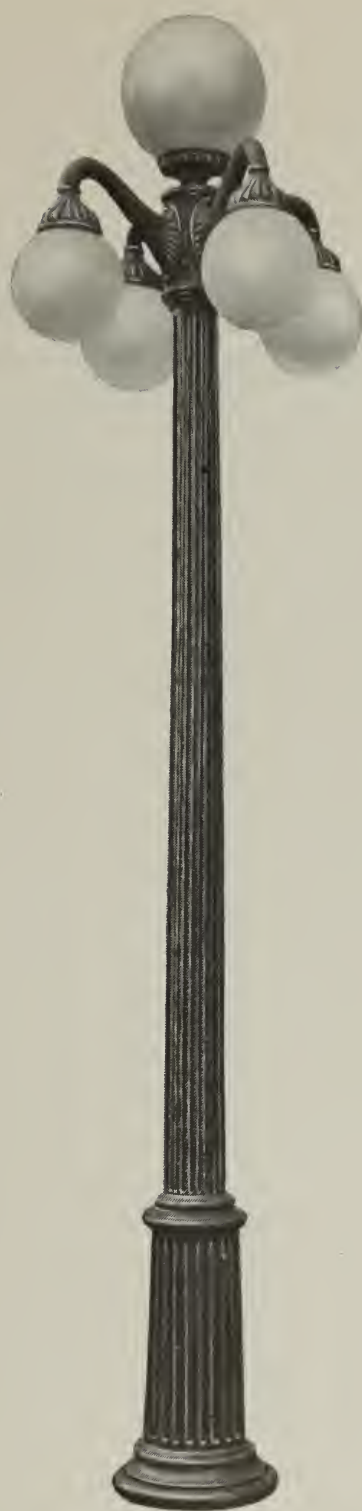


EXHIBIT "A' "

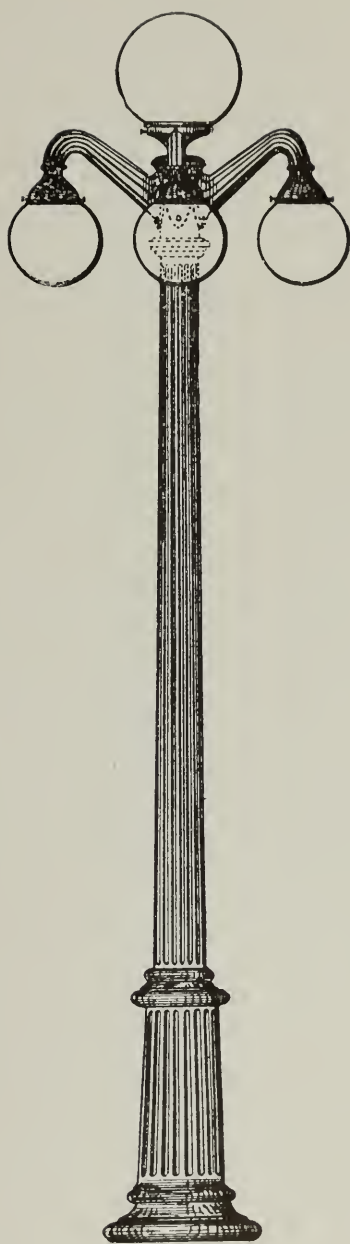
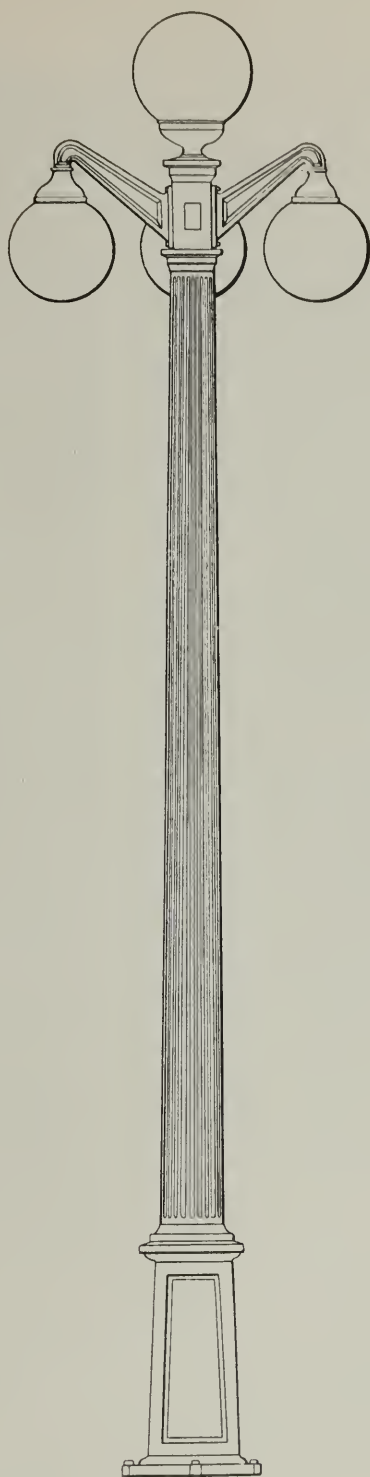


EXHIBIT "A"



TRACING
MADE BY

WM. C. SCHMITT 12-13-'12
of a blue print entitled as
follows,

EUGENE LIGHT DEP'T

STANDARD ORNAMENTAL POST
Scale 1"=1' Nov 29, 1911



EXHIBIT "C"

And afterwards, to wit, on the 14 day of May, 1913, there was duly filed in said Court, an Amended Answer, in words and figures as follows, to wit:

[Amended Answer.]

*"In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE, and THE INDEPENDENT
FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F.
GRIGGS,

Defendants.

The above named defendants, answering the Bill of Complaint of plaintiffs herein and for Amended Answer admit, deny and allege as follows:

I.

Answering paragraph I of defendants admit that Charles Edward Grelle of the above named plaintiffs is a resident of the City of Portland, in the above named District of Oregon, and that Independent Foundry Company, the other party plaintiff, is a corporation duly organized under the laws of the State of Oregon, and has its principle place of business in said City of Portland, and District of Oregon; that the above named defendant the City of Eugene is a duly incorporated City in the State and District of Oregon; that the defendant M. F. Griggs is a resident of said City of Eugene.

II.

Answering paragraph II defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny, that prior to the 2nd day of January, 1912, or at any time, the plaintiff Grelle was the true, original or sole inventor of a new or ornamental design for an article of manufacture, towit:—a five light lamp post, a blue print of the drawing of which alleged ornamental design is attached to plaintiffs complaint herein and marked "Exhibit A."

III.

Answering paragraph three defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny, that about the 2nd day of January, 1912, or at any time, the said Grelle filed in the office of the Commissioner of Patents of the United States an application, in any form, whereby he prayed for the granting of letters patent to him on any ornamental design whatever for the period or term of seven (7) years, or for any term or period of time whatever, in accordance with the statute for such cases provided, or otherwise, in any manner whatsoever.

IV.

Answering paragraph four defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny: that said alleged ornamental design claimed to be patented by plaintiff was not known or used by others in this country before the alleged invention thereof

by the plaintiff Grelle; that said design was not patented or described in any printed publication in this or in any foreign country before the alleged invention thereof by the plaintiff Grelle, or more than two years prior to his said alleged application for letters patent thereon; that said design was not in public use or on sale in this country for more than two years prior to his said alleged application for patent; that said alleged invention had not been patented in any country foreign to the United States, and that no application for patent had been filed by the plaintiff Grelle or his legal representatives or assigns in any country foreign to the United States prior to his alleged application, or at any time.

V.

Answering paragraph five defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny: that thereafter or at any time upon due or any proceedings had it was duly, or otherwise, adjudged by said Commissioner of Patents that the said Grelle was the true, original or sole inventor of said alleged ornamental design, for a lamp post, or lawfully, or in any manner, entitled to a patent thereon for the term of seven years or for any term or time whatever, as prayed for in said alleged application, or otherwise in any manner; that thereupon, or at any time, such proceedings were had that on the 12th day of March, 1912, or at any other time, letters patent of the United States were duly or otherwise issued to said plaintiff Grelle for said alleged new and ornamental design;

that said alleged letters patent were dated the 12th day of March, 1912, or dated at all, or numbered 42,-283, or numbered at all; that there was thereby, or otherwise, granted unto the said Grelle, or his legal representatives or assigns, or to any one, the exclusive right to make, use or vend said alleged invention throughout the United States or the territories thereof for the period of seven years from said alleged date of said alleged letters patent, or for any period of time whatever, from any date whatever; that plaintiffs, or any of them will produce or have ready in Court the said alleged letters patent of the United States at the hearing of this cause, or at any time, or place, as the Court may direct, or otherwise, in any manner.

VI.

Answering paragraph six defendants deny that said alleged letters patent numbered 42,283, or any letters patent whatever, protected or protects, said alleged ornamental design to all or any types or type of lamp posts embodying a plurality of laterally or radially disposed arms.

Further answering paragraph six defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny: that letters patent No. 42,283, or otherwise, or without number, issued on, related to, or covered, said alleged ornamental design to all or any types or type or lamp posts embodying a plurality of laterally or radially disposed arms; that plaintiff Grelle about October 2nd, 1912, or at any time, filed a further ap-

plication for letters patent in the office of the Commissioner of patents of the United States praying for the granting of letters patent to him on such alleged specific application of said alleged ornamental design for a period or term of seven years or for any period or term of time whatsoever; that thereafter, or at any time, it was adjudged by said Commissioner of Patents that said plaintiff Grelle was the true, original or sole inventor of said alleged ornamental design in its specific application for a five light lamp post, or otherwise; that thereupon, or at any time, or on any proceedings had, there were issued to the plaintiff Grelle, on December 10th, 1912, or at any time, letters patent of the United States on said last mentioned alleged application; that there was granted to plaintiff Grelle, or his representatives or assigns, the exclusive, or any, right of making, using, or vending the alleged invention so alleged to be patented, any place, for, or at, any time; that plaintiffs or any of them will produce or have ready in Court said last mentioned alleged letters patent of the United States at the hearing of this cause, or at any time, or place, as the Court may direct or otherwise, in any manner.

VII.

Answering paragraph seven defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny, that prior to the acts of defendants, in plaintiffs complaint herein complained of, or at any time, the plaintiff Grelle granted unto the Independent Foundry Company the exclusive, or any, license to practice said al-

leged invention under said alleged letters patent in the said District of Oregon, or any place, or that said alleged exclusive license is or has been, at any time, in full force.

VIII.

Answering paragraph eight defendants allege that they have not knowledge or information sufficient to form a belief as to the truth, and therefore deny that by virtue of said alleged exclusive license, or otherwise, the said Independent Foundry Company did equip itself to manufacture lamp posts embodying said alleged patented ornamental design, or did extensively, or otherwise, advertise such alleged fact, or did offer to manufacture lamp posts embodying said ornamental design for whomsoever would require the same, or that plaintiff expended large, or any, sums of money whatever in getting ready for the manufacture of lamp posts embodying said alleged patented ornamental design, or in advertising the same.

IX.

Answering paragraph nine defendants admit: that in seeking a market for lamp posts embodying said alleged patented ornamental design plaintiffs, about October 1911, fully disclosed said alleged ornamental design to the officers of the said City of Eugene, and particularly brought said alleged invention to the notice of the Water Board of said City; that thereafter, and about the early part of November, 1911, at the request of said Water Board of said City of Eugene, plaintiffs sent to said Water Board a photo of a lamp post manufactured by plaintiff Independent

Foundry Company embodying said alleged patented ornamental design; that said Water Board were and are the particular agents of said City of Eugene, having charge of the furnishing of light by said City to its residents; that plaintiffs made a bid to said Water Board and informed the latter that they were prepared to make and deliver lamp posts in accordance with such bid; that the said Water Board sent plaintiffs a blue print of a drawing for lamp posts which were to be erected in said City of Eugene, also specifications of the details to be followed in the mechanical construction of such lamp posts.

Further answering paragraph nine defendants deny: That the alleged ornamental design embodied in defendants said drawing of a lamp post is copied from or is substantially identical with or similar to that alleged to have been patented by plaintiff Grelle; that the officers or any officer of defendant City of Eugene knew or that plaintiff Grelle was the original inventor of said alleged ornamental design which it is alleged the Water Board desired to have copied in the lamp posts to be erected in said City of Eugene; that defendant City of Eugene induced the Gross Bros. Iron Works, or any one, to or that the Gross Bros. Iron Works, or any one, did make for said City of Eugene lamp posts copying or infringing upon said design.

Further answering paragraph nine defendants admit that there is attached to plaintiffs complaint a blue print marked "Exhibit B," but allege that they have no knowledge or information sufficient to form

a belief as to the truth and therefore deny that said blue print is a tracing of any blue print alleged to have been furnished by said Water Board to defendants or to plaintiffs.

Further answering paragraph nine defendants admit that there is attached to plaintiffs' complaint a cut marked "Exhibit A," but allege that they have no knowledge or information sufficient to form a belief as to the truth and therefore deny: that said cut is reproduced from a photograph taken from a lamp post manufactured by plaintiffs embodying said alleged patented ornamental design; that said photograph was taken about November 14th, 1911.

X.

Answering paragraph ten defendants deny that thereafter and about the 11th day of January, 1912, or at any time the City of Eugene determined to equip certain or any streets in said City of Eugene with lamp posts embodying said alleged ornamental design or that plaintiff at any time became apprised of any such fact, or that said City of Eugene at any time entered into a contract with Gross Bros.' Iron Works, of said City of Eugene, or with any one for the manufacture of such lamp posts or of any lamp posts embodying said alleged ornamental design.

Further answering paragraph ten defendants admit that about January 11, 1912, plaintiffs notified defendant City of Eugene in writing of the alleged pendency of said alleged application for letters patent of the United States on behalf of said Grelle on said alleged ornamental design and that plaintiffs would prosecute

any infringers thereof as soon as letters patent thereon were issued.

XI.

Answering paragraph eleven defendants allege that they have not knowledge or information sufficient to form a belief as to the truth and therefore deny that the alleged application for letters patent of the United States on said alleged ornamental design had in the meantime or at any time been successfully procured or allowed or letters patent granted thereon.

Further answering paragraph eleven defendants deny that they or either of them at any time induced or procured the Gross Bros. Iron Works or any one to manufacture for said Water Board lamp posts substantially identical with or in any way infringing upon said alleged ornamental design.

Further answering paragraph eleven defendants admit that plaintiffs caused said City of Eugene to be notified in writing of the alleged issuance of letters patent on said alleged ornamental design demanding in said notice that said City of Eugene desist from procuring to be manufactured or erected in said City of Eugene lamp posts infringing upon said alleged patented ornamental design.

XII.

Answering paragraph twelve defendants deny: that defendant City of Eugene procured from said Gross Bros. Iron Works, or from any one, lamp posts infringing said alleged patented ornamental design, or did sell any such post to defendant M. F. Griggs, or did cause any such post to be erected any place in said

City of Eugene; that said defendant City of Eugene sold or erected any such lamp post to any one or at any time; that any acts of defendants as in plaintiffs' complaint herein complained of have in any way violated any right or rights of plaintiffs herein; that defendant City of Eugene in any manner has furnished or is furnishing electricity for or has lighted, maintained, used, operated or is lighting, maintaining, using or operating, or has profited by or is profiting by the use or operation of any such infringing lamp post, or in violation of any rights of plaintiffs herein in any manner whatsoever; that defendant City of Eugene sold any lamp post to M. F. Griggs, or to any one at any time.

XIII.

Answering paragraph thirteen defendants deny that the lamp post erected in front of the premises controlled by defendant M. F. Griggs is an infringement of said alleged patented ornamental design of plaintiffs or violates any right of the latter or is or has been maintained or used in violation of any rights of plaintiffs.

XIV.

Answering paragraph fourteen defendants admit that there is attached to plaintiffs' complaint and marked "Exhibit C," a photographic reproduction of a lamp post but deny that the same is of any infringing lamp post sold by defendant City of Eugene to defendant M. F. Griggs, or now erected or used or maintained by defendants in front of any premises owned or controlled by defendant M. F. Griggs any

place or in violation of any rights of plaintiffs or that the same is of any post sold by defendant City of Eugene to defendant M. F. Griggs or to any one, or of any post infringing any alleged patent.

XV.

Answering paragraph fifteen defendants deny that said City of Eugene has been at any time, or now is, seeking to induce any one to purchase from it lamp posts infringing upon said alleged patented ornamental design, or any lamp posts, or to permit the latter to erect any place, use or maintain in use any lamp posts substantially identical with or infringing upon said alleged patented ornamental design, or in any way in violation of any rights of plaintiffs.

XVI.

Answering paragraph sixteen defendants allege that they have not knowledge or information sufficient to form a belief as to the truth and therefore deny that plaintiff Independent Foundry Company has made expensive or any patterns or otherwise equipped itself at great or any expense for manufacturing lamp posts embodying said alleged patented ornamental design.

Further answering paragraph sixteen defendants deny: that mere compensation for any acts of defendants complained of would be inadequate to the plaintiffs; that any equipment or enterprise of plaintiffs would be rendered valueless or injured at all by the continuance by the defendants of any acts attributable to them; that plaintiffs have no adequate or sufficient remedy except by injunction.

XVII.

Further answering paragraph nine of plaintiffs complaint herein defendants deny that about the latter part of November, 1911, or at any time, said Water Board of the City of Eugene, informed the plaintiffs or any one else that they had concluded to adopt a design like that shown in the photo referred to in said paragraph nine as furnished by plaintiffs to defendants.

1.

For a first further and separate answer defendants allege:

I.

That the post maintained by defendants which plaintiffs claim infringes their alleged patent is not identical with, or in any manner similar to, plaintiffs alleged patented post so far as ornamental appearance to the eye is concerned, or at all; that said post maintained by defendants has a square base with square block panels while the post alleged to be patented by plaintiff has a round fluted base which is in every material essential vitally different from the base of the post maintained by defendants so far as appearance to the eye is concerned; that the head and arms of the post maintained by defendants are square paneled while the head and arms of the post alleged to be patented by plaintiff has round head and arms with fluting thereon and is in every material essential vitally different from the post maintained by defendants so far as appearance to the eye is concerned; that in shape, form, dimensions and appearances the

said post maintained by defendants is materially and essentially different from the post alleged to be patented by plaintiffs, which is described in plaintiffs complaint herein.

2.

For a second further and separate answer defendants allege:

I.

That the alleged patent which plaintiffs herein claim has been infringed upon by defendants as alleged in plaintiffs' complaint herein is not the result of inventive genius; is not novel in any way; would not require the exercise of originality or inventive faculties in designing, and that consequently said design is not patentable, and that if any patent has heretofore issued thereon the same is void, or any patent hereafter issued thereon would necessarily be void.

3.

For a third and separate answer defendants allege:

I.

That five (5) light lamp posts embodying the design claimed herein to be patented by plaintiff have been on sale and in public use for more than two (2) years prior to plaintiffs alleged application for a patent thereof, towit: On sale by the Independent Foundry Company, plaintiff herein, in the City of Portland, Oregon; used by the City of Portland, Oregon, by said City therein and also in and by numerous other cities of this and foreign countries.

II.

That defendants are informed and believe and

therefore allege that five (5) light lamp posts very similar in design to the design of post claimed to be patented by plaintiff and much more like them in appearance than the post maintained by defendants, which plaintiffs' claim infringes their alleged patent, are now and for more than two (2) years prior to plaintiffs alleged application for patent have been in use in the following Cities of this country, to-wit:

St. Paul, Minnesota, Grand Forks, North Dakota, Minneapolis, Minnesota, Chicago, Illinois, Kansas City, Missouri, Kansas City, Kansas, Des Moines, Iowa, Ft. Wayne, Indiana, Cincinnati, Ohio, Canton, Ohio, and also in the City of Puebla, Mexico.

III.

Defendants hereby give notice to plaintiffs and to plaintiffs' attorney that they intend to prove the foregoing allegations upon the trial of this cause.

4.

For a fourth further and separate answer defendants allege:

I.

That five (5) light lamp posts very similar in design to the design of post claimed to be patented by plaintiff and much more like them than the post maintained by defendants, which plaintiffs claim infringes their alleged patent have for a number of years immediately last past, and long prior to plaintiffs' alleged or supposed invention or discovery been and now are described in printed publications distributed throughout this country and foreign countries in advertising.

II.

That the parties making some of these publications, their addresses and designation of the types of post, are as follows, towit:

E. Metz, Jr., Kansas City, Missouri, L.S.-1;

McDonnell Iron Works, Des Moines, Iowa, styles Imperial, Crown and Regal;

Minneapolis Steel and Machinery Company, Minneapolis, Minnesota;

The Western Gas Construction Company, Fort Wayne, Indiana;

The Independent Foundry Company, Portland, Oregon, five lights, type B;

Western Electric Company, New York,-Chicago, etc., Cutters Boulevard Post; and the

Electric Railway Equipment Company, Cincinnati, Ohio, No. 10,040.

III.

The defendants hereby give notice to plaintiffs and to plaintiffs' attorney that they intend to prove the foregoing allegations upon the trial of this cause.

5.

For a fifth further and separate answer the defendants allege:

I.

That shortly prior to the 14th day of November, 1911, the defendant City of Eugene intended to and was about to install a street lighting system for said City, which required lamp posts, and defendant city's agents and officers at said time talked with the plaintiffs with a view of obtaining from them the required

lamp posts suitable and necessary for said lighting system. That thereafter, pursuant to said conversation and supplemental thereto, plaintiffs, on the 14th day of November, 1911, wrote and sent to defendant city a letter, which letter defendant received, and which letter was accompanied by a photograph of plaintiffs' lamp post mentioned and described in plaintiffs' complaint, and which letter was in substance an offer to furnish said lamp post at the very best price to be ascertained subsequently. That the defendant City of Eugene replied to said letter in writing on the 21st day of November, 1911, to the effect that the Water Board of said City desired plaintiffs' best quotation on the lamp post described in the said photograph, and also to the effect that the foundries in Eugene were desirous of competing for the work of making lamp posts for the said street lighting system, and that the defendant City would probably get out a design of its own for the lamp posts required, and that the defendant City would determine from a consideration of the prices quoted by plaintiff whether it would go to the trouble and expense of designing a special lamp post.

II.

That the plaintiffs replied to the said letter of November 21st on the 27th of November, 1911, to the effect that they were not in a position to quote fixed price on the design of the lamp post sent in said photograph, and said letter also advised the defendant City that the City could not afford to make a new and special design for such a limited number of lamp posts

as would be required. That the defendant City replied to said letter of November 27th on November 28th, 1911, thanking plaintiffs for information contained in their said letter and stating that the City was anxious to secure an exact quotation on lamp posts of which they had a photograph, as aforesaid.

III.

That the plaintiffs, replying to the defendant City's letter of November 28th, on December 1st, 1911, quoted the City a price of \$42.00 f.o.b. Eugene, for lamp posts as per the photograph referred to. The plaintiffs in this letter also state, in substance and effect, that they trusted that when the City was ready to take competitive figures it would give them a chance to put their quotation before the City in a formal proposition.

IV.

On December 7th, 1911, the defendant City sent to plaintiffs a letter inviting from plaintiffs quotations on the Type "S" five-light post of which the City had the said photograph, and also on the same post arranged for three-light and one-light, and in said letter the said City also enclosed a set of prints and specifications covering a design for the ornamental post which was afterwards manufactured by Gross Brothers, as alleged in the complaint, and the said City also asked the plaintiffs to quote their best figures on the said last named lamp post.

V.

Plaintiffs, in reply to the defendant City's letter of December 7th, 1911, on December 9th, 1911, sent to

defendant City the following letter:

THE INDEPENDENT FOUNDRY CO.,

Portland, Oregon.

Portland, Oregon, Dec. 9, 1911.

Eugene Water Board,

Eugene, Oregon.

Gentlemen: **Attention Mr. Alvin Meyers.**

We propose to furnish you ornamental street posts as per your specifications of Dec. 7th, 1911, and according to your drawings of your standard ornamental posts as follows:

Approximately 92—5 light posts \$32.00 each

“ 8—1 light posts \$28.00 “

Alternative quotations:

Approximately 92—3 light posts \$30.00 each

“ 8—1 light posts \$28.00 “

Also beg to submit alternative quotation on our type S post, of which you have photograph:

Approximately 92—5 light posts \$32.00 each

“ 8—1 light posts \$28.00 “

Or “ 92—3 light posts \$30.00 “

The following prices are based on delivery f.o.b. cars, City of Eugene, Oregon. The delivery could be made complete in 60 days on your standard posts and in 45 days on our type S post.

Trusting that we may have your order for same, we remain

Yours very truly,

Independent Foundry Co.,

Signed C. E. Grelle.

P. S. Cut of our type S—5 light post attached.

VI.

That on January 11, 1912, the plaintiffs sent defendant City a letter to the effect that they had made application for patent on their design of the Type "S" lamp post mentioned in the complaint, and that after having a preliminary search made they felt confident that their application would be granted, and that they would in that case protect their rights against infringement. That said letter of January 11, 1912, contained the first information that defendant City had that plaintiffs intended to apply for a patent for their Type "S" lamp post. That the plaintiffs had failed to mention to defendant City in any conversation or any of the letters mentioned, or at all, that they intended to apply for a patent for their said post.

VII.

That on or about the 13th day of December, 1911, the defendant City considered the proposal of plaintiffs to manufacture and furnish plaintiffs' lamp post Type "S", and also the lamp post designated by defendant City, and at said time considered the proposals of other bidders to furnish the lamp post designed by defendant City, and after a consideration of all of said proposals and bids the defendant City, on or about the 13th day of December, 1911, awarded the contract to furnish the required number of lamp posts as designed by said City to Gross Brothers, and on said date entered into a binding contract with said Gross Brothers to receive and pay for said posts.

VIII.

That pursuant to said contract the said Gross

Brothers commenced to manufacture said posts and had made all the necessary preparations therefor, at great expense, and had manufactured a number of said posts prior to January 2, 1912, and before plaintiffs had made any claim to defendants that their lamp post Type "S" was patentable or that they intended to apply for a patent for the same.

IX.

That the plaintiffs, by making a competitive bid to furnish the posts designed by said City, and by reason of the premises, licensed and permitted the defendants to manufacture and use said posts for the said street lighting system of defendant City.

That by reason of the premises the plaintiffs have abandoned their patent and the rights thereunder, so far as the same would interfere with the defendants in installing the lamp post designed by the said City.

That by reason of the premises the plaintiffs are and ought to be estopped from claiming or asserting any rights under said pretended patent that would be in conflict with the right of defendants to manufacture said posts and install the same for the said street lighting system of defendant City.

The defendant, City of Eugene, answering interrogatory No. 1, alleged in plaintiffs' complaint, alleges and says that it has not since the 12th day of March, 1912, caused to be made or delivered anywhere within the District of Oregon, or elsewhere, lamp posts substantially or otherwise embodying ornamental design of plaintiffs, or similar thereto, but the City of Eugene on or about the 13th day of December, 1911, entered

into a contract with Gross Bros. Iron Works, of the City of Eugene, for the manufacture of a five light lamp post designed by the Engineers of the said City of Eugene, and that said Gross Bros. Iron Works, pursuant to said contract manufactured ninety-two lamp posts; that the cost of said lamp posts to the City of Eugene was Thirty-four (\$34.00) Dollars for each post; but that the City of Eugene has not resold any of said lamp posts, and therefore, has made no profit thereon; and that said lamp posts manufactured for said City by said Gross Bros. Iron Works is not similar to, or substantially embodying the ornamental design of, the type "S" post manufactured by the plaintiffs.

The defendant City of Eugene, answering plaintiffs' interrogatory No. 2 alleges and says that the said City of Eugene has not erected, or is not maintaining or using therein, or furnishing light for any lamp post substantially embodying the patented ornamental design of plaintiffs, or similar thereto.

The defendant, M. F. Griggs, answering interrogatory No. 3, says that the lamp post shown in photograph exhibit "B," attached to plaintiffs' complaint was erected adjacent to his premises at the corner of Fifth and Willamette Streets, Eugene, Oregon, by the City of Eugene, and the same is owned and controlled by the City of Eugene; that said defendant paid to the City of Eugene, for the actual cost of placing said post at said premises, which includes all equipment, the sum of Eighty (\$80.00) Dollars; and that the said amount has been paid in full; that the said post be-

longs to the City of Eugene, and the said City of Eugene maintains said post and furnishes the electrical energy for lighting the same at its own expense.

WHEREFORE, defendants pray that the bill of Complaint of plaintiffs herein be dismissed; that defendants have decree for their costs herein and such other and further relief as to the Court may seem just.

G. F. SKIPWORTH,
JOHN M. PIPES,
GEORGE A. PIPES,
Solicitors and Counselors
for Defendants.

[Endorsed]: Amended Answer. Filed May 14, 1913.

A. M. CANNON,
Clerk U. S. District Court.

And afterwards, to wit, on the 7 day of July, 1914, there was duly filed in said Court, a Statement of Evidence, in words and figures as follows, to wit:

[Statement of Evidence.]

*In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE and THE INDE-
PENDENT FOUNDRY COMPANY,
Plaintiffs,

v.

THE CITY OF EUGENE and M. F. GRIGGS,
Defendants.

CHARLES E. GRELLE, called as a witness on behalf of plaintiffs, being first duly sworn, testified as follows on

Direct Examination.

A. My name is Charles Edward Grelle. 36. I am manager of the Independent Foundry Company. I reside in Portland, Oregon.

A. The Independent Foundry Company is a corporation incorporated under the laws of the State of Oregon, doing business in the City of Portland.

A. I am president and manager of the company.

A. Shortly prior to Oct. 1911 I had a visit from a Mr. Alvin Meyers, representative of the Water Board, of Eugene, Ore., looking into possible types of posts that they might favor in their installation at the City of Eugene; and I submitted such designs as I had for their consideration.

Mr. Meyers' visit was sort of preliminary. He was getting data and designs; had nothing definite in the way of being able to decide what posts he might want, nor how many he would want. I submitted such designs that I had been manufacturing for some time; also submitted a sketch of a new design that I had recently developed—hadn't yet finished the post of. This design seemed to appeal particularly to Mr. Meyers, more so than the other posts that I had pictures of. That was about all there was to the first visit.

I showed Mr. Meyers in the first case a preliminary drawing—the first drawing made to scale of my de-

sign. That was previous to the time that it had been put into a working drawing.

The design related to the picture of what we later designated as the "Type S" post.

Later I sent a photo or picture to Mr. Meyers at his request.

Later we had completed patterns, and made a post according to this original design. I had a photograph made of the post, and sent same to Mr. Meyers.

Defts. admit that photo attached to the bill of complaint is the photograph.

Plffs. exhibit A is here shown witness.

That is the cut I had made of the photograph submitted to Mr. Meyers of the post.

Later I received this letter from Mr. Meyers:

Marked "Plaintiffs' Exhibit B."

Eugene, Ore. 10/26/11.

"EUGENE WATER BOARD.

"Water and Power Utilities.

"Independent Foundry Co.,

Portland, Ore.

Gentlemen:

Attention Mr. C. E. Grelle.

Kindly send me photo and quotations of your latest design of ornamental street lighting post as per our conversation of Oct. 25." (In pencil, admitted to be part of the letter)—"soon as you get design complete."

"Yours truly, Alvin Meyers."

The conversation with Mr. Meyers was about a

week or ten days previous to this date.

In reply I wrote this letter marked "Plaintiffs' Exhibit C:"

"Portland, Oregon, October 27, 1911.

"Mr. Alvin Meyers,

Eugene, Oregon.

Dear Sir:—

We have your note of the 26th, and beg to say that we will be pleased to send you a photograph of the new design of street lighting posts just as soon as we can get the first post erected and photographed. We trust that this will be by the end of the coming week. We will then also be able to quote you price on same.

Yours very truly,

Independent Foundry Co."

The Independent Foundry Co. was given by me the exclusive license under this patent.

Q. Now, I will show you a carbon copy of a letter, and ask you to examine it and state to the court what it is.

Mr. GEISLER: No objection to this?

Mr. SKIPWORTH: I have no objection. I am willing to have all the correspondence go in.

Mr. GEISLER: You need not answer that question, because we have agreed between ourselves. I introduce in evidence as Plffs. Exhibit "D" which reads as follows:

“Portland, Oregon, Nov. 14, 1911.

“Mr. Alvin Meyers,

Eugene, Ore.

Dear Sir:—

We are enclosing you under separate cover a photograph of our new type of five light street lighting post. This is not a very good photograph due to the fact that it was taken on a dark and stormy day, but we had it taken so that we could send you a copy at the earliest date. This post will be a cheaper post than the five light post quoted you on previously, but we are at present not in a position to give you exact price. Should you decide on this type, we would be glad to make you our very best price.

In regard to the globe holders might say that the size of this globe holder could be readily changed to carry almost any size of series sockets. The base of this post has a hand-hole, which is not shown in the photograph and the foundation bolts are on the inside. The height of this post from base to top of top globe holder is 12 ft.

Trusting that you will find this new design attractive and that we may hear from you favorably, we remain,

Yours truly,

Independent Foundry Co.

By C. E. Grelle.”

Plff. next introduced by consent

“PLAINTIFFS’ EXHIBIT E,”

the reply of Mr. Alvin Meyers on behalf of the Eugene Water Board to the last mentioned letter:

“Attention Mr. C. E. Grelle.

Eugene, Ore. Nov. 21, 1911.

Independent Foundry Co.,

York St., Between 22nd & 23rd,

Portland, Ore.

Gentlemen:

Referring to yours of Nov. 14, The Eugene Water Board has requested me to ask you for your best quotation on your latest type of ornamental lamp posts, that is the round, fluted standard, of which you sent me photograph in yours of Nov. 14. It is desirable that these posts should be about one foot higher for our service.

Kindly quote us on five and three light posts.

We should also be pleased to know the size of glassware which you used at the time the photograph was taken.

The home foundries here are desirous of competing for this work, and we will probably get out a design of our own later, but should like your figures on this particular post, as close as you may be able to give them, so that we can decide whether or not it will be advisable to go to the trouble and expense of designing a special post.

Very truly yours,

THE EUGENE WATER BOARD,

By Alvin Meyers, Superintendent.”

Plff. next introduced the letter written by the Independent Foundry Company, plaintiff, to Mr. Alvin Meyers, of the Eugene Water Board, under date of November 27, 1911.

Marked "Plaintiffs' Exhibit F," and reading as follows:

"Portland, Oregon, Nov. 27, 1911.

Mr. Alvin Meyers,

Eugene, Ore.

Dear Sir:—

Yours of Nov. 21st at hand, and answer to same has been delayed awaiting the writer's return to the city. We are not yet in a position to quote you a fixed price on the new design of which we sent you a photograph, but can say that it will not be more and probably slightly less than the 5 light type B post, of which there are a few in your city. The 3 light posts will of course be slightly less in price.

In regard to the glassware used when we made this photograph; the lower globes are 6 x 12 and the upper globe is 7 x 16. In this connection will say that the globe holders may or may not fit a series socket that you contemplate using but the shape or the size of these could be changed from the size shown in photograph without a great deal of trouble.

In regard to the advisability of making up a new and special design, we trust that you will bear in mind that the cost of patterns on a post of this kind is a considerable item, and for a limited number, such as you will need for your installation, the cost of the patterns per post would necessitate the price on a special design being considerably higher than we could figure on this post of which we already have the patterns. Furthermore, in designing a post, we have had considerable experience in this line, and find that there is

a good deal of difference between the looks of a post on paper and a view of the finished and erected post, or a photograph of it. You will no doubt remember the sketch we showed you of our new design when you were in our office. We were pretty well satisfied with the sketch, but before we had the finished article in the shape that we wanted it, we made several decided changes, which probably are not apparent when comparing the photograph with the sketch as first made. We are sending you another photograph of this post in case you may have need of it.

We trust that this design will be acceptable to you, and that when you are ready to ask for quotations, we will be able to give you figures that will be satisfactory, and that will land the business. We trust the delay in answering your letter has not caused you any inconvenience.

Yours very truly,

Independent Foundry Co.,

By C. E. Grelle."

Plff. next introduced the reply of the Eugene Water Board, over the signature of Mr. Meyers, dated November 28, 1911.

Marked "Plaintiffs' Exhibit G," and reading as follows:

"Eugene Water Board

Water and Power Utilities.

Nov. 28, 1911.

Independent Foundry Co.,

Portland, Ore.

Gentlemen:

Yours of Nov. 27th received this morning.

We beg to thank you for the information enclosed, and are anxious to secure an exact quotation on this post.

Yours truly,

EUGENE WATER BOARD,

AM-BFD

By Alvin Meyers, Superintendent."

Plff. further introduced letter written by Independent Foundry Company in reply to the last letter of Eugene Water Board.

Marked "Plaintiffs' Exhibit H," and reading as follows:

"Portland, Oregon, Dec. 1, 1911.

Mr. Alvin Meyers, Supt.,

Water Board,

Eugene, Oregon.

Dear Sir:—

In reply to yours of the 28th, we figure that we could furnish these posts, as per the photograph sent you, for \$42.00 f.o.b. Eugene. You do not mention the number required, but we presume it would be between seventy-five and one hundred.

We trust that when you are ready to take competitive figures, you will give us a chance to put our quotation before you in a formal proposition.

Yours truly,

Independent Foundry Co.,

Dict. CEG.

By C. E. Grelle."

Signed in his absence by F. R. M.

Plff. further introduced a letter to Eugene Water Board from the Independent Foundry Company, under date of December 9, 1911, having attached there-

to a cut of the lamp-post designed by the plaintiff Mr Grelle.

Letter marked "Plaintiffs' Exhibit I," and reading as follows:

"Portland, Oregon, Dec. 9, 1911.

Eugene Water Board,

Eugene, Oregon.

Gentlemen:— **Attention Mr. Alvin Meyers.**

We propose to furnish you ornamental street posts, as per your specifications of Dec. 7th, 1911, and according to your drawings of your standard ornamental posts as follows:

Approximately 92—5 light posts \$32.00 each

“ 8—1 light posts \$28.00 “

Alternative quotation:

Approximately 92—3 light posts \$30.00 each

“ 8—1 light posts \$28.00 “

Also beg to submit alternative quotation on our type S post, of which you have photograph:

Approximately 92—5 light posts \$32.00 each

“ 8—1 light posts \$28.00 “

Or “ 92—3 light posts \$30.00 “

The following prices are based on delivery f.o.b. cars, city of Eugene, Oregon. The delivery could be made complete in 60 days on your standard posts and in 45 days on our type S post.

Trusting that we may have your order for same, we remain,

Yours very truly,

Independent Foundry Co.

C. E. Grelle.

P. S. Cut of our type S—5 light post attached.”

The last referred cut marked "Plaintiffs' Exhibit J."

Plffs. next introduced the letter written by the Eugene Water Board in reply to last letter. Such reply letter was marked "Plaintiffs' Exhibit K," and reads as follows:

"Attention Mr. C. E. Grelle.

Eugene, Ore. Dec. 14, 1911.

Independent Foundry Co.,

Portland, Ore.

Gentlemen:

With reference to your communication of Dec. 9, which embraced quotation on ornamental street lighting posts submitted according to drawings and specifications furnished by this office, beg to confirm our telephone advice to the effect that contract for these posts has been awarded to a local firm of this city.

We wish to take advantage of this occasion to express to you our thanks for your interest in the matter, and wishing you all possible success for the future, we remain,

Very truly yours,

EUGENE WATER BOARD,

By C. W. G."

Plffs. next introduced the letter written by the plaintiffs under date of January 11, 1912, to the Eugene Water Board.

Marked "Plaintiffs' Exhibit L," and reads as follows:

"Portland, Oregon, Jan. 11, 1912.

Eugene Water Board,

Eugene, Oregon.

Gentlemen:—

You are having manufactured at the City of Eugene, some street lighting posts according to your design. This design corresponds in numerous essentials to design of our lamp post, designated 'Type S' of which we enclose you cut. Some time ago, we made application for patent on this design, and after having a preliminary search made, feel confident that our application will be granted: in which case, we shall certainly protect our rights against infringement. We have notified the manufacturers, who are making your posts, to this effect.

Yours truly,

Independent Foundry Co.,

By C.E.Grelle."

Plffs. also introduced a letter of similar purport to Gross Brothers, who had the contract.

Marked "Plaintiffs' Exhibit M," and reads as follows:

Portland, Oregon, Jan. 11, 1912.

Gross Bros. Iron Works,

Eugene, Oregon.

Gentlemen:—

We understand that you are manufacturing for the Eugene Water Board some lamp posts according to the City Water Board's drawing. This drawing corresponds in numerous essentials to our design, designated as Type S, of which we are enclosing you a cut. Some time ago, we made application for patent on this design, and after having a preliminary search made, we are confident that patent will be allowed.

which matter will come up in the near future. We are advising you of these facts at the present time, for, if our application is allowed, we will certainly protect our rights in the matter.

Yours truly,

Independent Foundry Co.,

By C. E. Grelle."

Plffs. further introduced two letters marked "Plaintiffs' Exhibit N" and "Plaintiffs' Exhibit O," sent by the Independent Foundry Company to Water Board, Eugene, Oregon, and Gross Bros. Iron Works, Eugene, Oregon, Plffs. Exh. N. reads as follows:

"Portland, Oregon, March 6, 1912.

Water Board,

Eugene, Ore.

Gentlemen:—

Kindly be informed that we have received notification from E. B. Moore, Commissioner of Patents, that our patent on our Type S post had been allowed, and that patent will be issued, dated March 12th.

Yours truly,

Independent Foundry Co.,

By C. E. Grelle."

Plaintiffs' Exhibit O. reads:

"Portland, Oregon, March 6, 1912.

Gross Bros. Iron Works,

Eugene, Oregon.

Gentlemen:—

Kindly be informed that we have received notification from E. B. Moore, Commissioner of Patents, that our patent on our Type S post had been allowed and

that patent will be issued, dated March 12th.

Yours truly,

Independent Foundry Co.,

By C. E. Grelle."

COURT: The contract was let in January?

Mr. SKIPWORTH: The contract was let in December.

Plffs. here introduced carbon copy of a letter sent by T. J. Geisler, Attorney for the Plaintiffs, to the Mayor and Water Board of the City of Eugene, Oregon, under date of March 14, 1912. Marked

PLFFS. EXH. P,

and reads:

"Portland, Ore., Mar. 14, 1912.

To the Mayor & Water Board of

the City of Eugene, Ore.

Gentlemen:—

I have been informed by my client, Mr Charles Edward Grelle, of this city, that you are about putting out lamp posts in the city of Eugene made by the Gross Bros. Iron Wks., of Eugene, Ore., which lamp posts are an infringement of the Design patented to Mr. Grelle the 12th inst. I enclose a blue print of the drawing constituting a part of said patent herewith for your inspection. I am also informed that there are slight, unimportant variations in the Design of your lamp post, but nevertheless the main features, and the effect produced, are identical with the design as patented.

Believing that the transaction referred to came

about inadvertently, and that you do not desire to wilfully infringe the patent in question, I beg to call the matter to your attention and ask you forthwith to make the proper arrangements, either with myself or Mr. Grelle, for obtaining a license on fair compensation permitting you to use his design. I have also written on the subject to the Gross Bros. Iron Wks.

Awaiting your early reply, I am,

Yours respectfully,

T. J. Geislér,

Attorney for Charles E. Grelle."

Plffs. also introduced as Plffs. Exh. Q a letter to the same purport to Gross Bros. Iron Works of Eugene, Ore.

Defts. admit that the letters mentioning having cuts attached to the copies did have cuts attached to them.

Examination of Witness Grelle continued:

Prior to making my application for patent on January 2, 1912, that is the first patent issued to me by the United States Patent Office, I had our attorney, Mr. Geisler, have a search made at the Patent Office to ascertain whether the design submitted was patentable. I was informed through Mr. Geisler and the Patent Office that it was.

Mr. GEISLER: For the purpose of showing what proceedings were had, I have the receipt for the application for patent and the final action in the case, and the notice of allowance, and I would like to introduce them in evidence.

They show that the application on Patent No.

42,283 was filed January 2, 1912, under serial number 669,112; that it was acted upon by the United States Patent Office Examiner January 19, 1912. It also shows action necessary for removal of informality; otherwise stating that the application was allowable. And on February 16, 1912, the formal notice of allowance in the case was issued. I will introduce this as one exhibit.

Marked "Plaintiffs' Exhibit R."

Plaintiffs next introduced the patent, dated March 12, 1912, which I have just referred to. I have not formally introduced it. (No. 42,283).

Marked "Plaintiffs' Exhibit S."

Plaintiffs also introduced the letters patent issued December 10, 1912, No. 43,338, as part of Plffs.

COURT: Do you claim that the five-light post of December 10, 1912, is a type "S" post as well?

Mr. GEISLER: Yes, your Honor. All relate to the type "S" post.

Exam. of Witness Grelle continued:

Handed two blue prints.

These are blue prints and specifications sent to me by the Eugene Water Board.

To bid on the posts.

Blue prints were received without objection, and marked "Plaintiffs' Exhibit U" and "Plaintiffs' Ex. V."

COURT: This has a square base and a square top?

Mr. SKIPWORTH: Yes.

COURT: But the arms are square and fluted?

Mr. SKIPWORTH: No, your Honor.

COURT: But the column is round?

Mr. SKIPWORTH: Yes, the column is round.

COURT: Who designed those posts?

Mr. SKIPWORTH: Mr. Meyers, of the Water Board, designed them.

Exam. of Grelle continued: Shown two other blue prints.

These are copies of our shop working drawings of "Type S" post.

They are exact copies.

Marked "Plaintiffs' Ex. W" and "Plaintiffs' Ex. X."

I graduated in mechanical engineering, and am familiar with drawings, mechanical drawings and with taking measurements of details for mechanical drawings.

Witness here shown Plffs. Exhibit Y.

This is an outline drawing of two posts, original design made according to scale from the working drawings, and an outline of the post submitted, to the same scale in fact, copy of the drawings submitted as "Plaintiffs' Exhibit V."

The one on the left is our "Type S" post, and that one on the right is a copy of "Exhibit V."

The copy of Exhibit "V" was made by taking the points on that exhibit, prick-pointing through onto the paper, so that it was an exact copy, without any alterations. The outline of the type "S" post was made from the working drawings, to the same scale as indicated on Exhibit "V."

I made these drawings and did the scaling. The scale was accurately applied.

Mr. GEISLER: I offer this in evidence, if the Court please, as showing to the court what the outlines of the two posts would represent; that is to say, the type "S" post, which is patented by the plaintiff, and the post which the defendant designed through its Water Board.

COURT: Do you offer that to show the similarity?

Mr. GEISLER: The similarity, yes, your Honor.

COURT: To show that they are practically the same post?

Mr. GEISLER: Yes.

Received without objection, and marked "Plaintiffs' Exhibit Y."

Mr. SKIPWORTH: That is a section right out of the center, isn't it?

Mr. GEISLER: We call it a profile or outline of the contour.

Plffs. further introduced "Exhibit Z," reading as follows:

"Attention Mr. Grelle. Eugene, Ore., Dec. 7, 1911.
Independent Foundry Co.,

Portland, Ore.

Gentlemen:

I am enclosing herewith a set of prints and specifications covering a design for ornamental posts desired for the city of Eugene. We would be pleased to have you give us your best quotations, as per the enclosed sheet marked quotations. You need not fill

in the quotations under 'one-half the total order.'

Kindly give me similar quotations on your type S, 5-light posts, also on the same post arranged for 3 light and 1 light.

It is quite likely that we will use the 5 light posts throughout, with a few 1 light posts. However, the alternative quotation is desired as it is possible we may use a 3 light post instead of the 5 light post. In this case the head for the post would be closed on two sides so that at any future time the other two arms might be installed.

As there is a meeting of the Eugene Water Board next Monday night I would be pleased to have your quotation on hand for that meeting. The order will probably be placed very shortly after the next Monday meeting.

Very truly yours,

Alvin Meyers, Supt."

This letter preceded the specific quotation which was written by the Independent Foundry Company to the defendants.

Q. Mr. Grelle, in order that there may be no misunderstanding as to what you meant when you said you drew these two sketches of the plaintiffs' and defendants' posts according to scale, but to the same scale, I wish you would explain fully to the court what you mean by that. I mean what you mean by saying the same scale.

A. In making a drawing of the defendants' post, which was submitted as Exhibit "V," that drawing is marked "Scale 1 inch equals 1 foot." I took their

drawing to be correct according to that scale, or course, and transferred from this drawing onto this drawing (Exhibit Y)—that is, from Exhibit “V” onto Exhibit “Y”; to get the Type “S” post to compare with the Defendants’ post, I used the scale of one inch to one foot, taking the measurements from the working drawings which have been submitted, and transferring them to the scale of one inch to one foot onto the drawing of Exhibit “Y.” That is, wherever there was twelve inches on the working drawings, that 12 inches was represented by one inch on this drawing, on Exhibit “Y”. There was no attempt made, of course, to make the dimensions of the two posts alike. This drawing is simply a representation on the same scale of the defendants’ drawing as shown on Exhibit “V” and our type “S” as shown by the working drawings.

I had some conversation, with regard to a notice of intention to prosecute the City of Eugene for infringement with a Mr. Svarverud, at Eugene.

Before taking this matter into the court, our attorney and I went to Eugene and consulted with Mr. Svarverud, the president of the Water Board. I personally asked him whether or not he had received our letters stating that we intended to take this matter into the courts, and also asked him to express his opinion on it—what his ideas were of our stand in the matter, as we had not had a reply to any of the letters of notification. Mr. Svarverud was rather indignant at our coming up to see him. After I explained to him that it was not a personal matter be-

tween himself and myself, but simply a matter of business, he stated that they had received this notification, but had no intention of paying any attention to it, and that if we wanted to take the matter into the courts we should do so. I believe his words were that he would "fight us to the last ditch." That was the only expression as to how the Water Board of the City of Eugene felt about the whole matter that we have received.

I don't recall the date of this conversation, but it was a very short time before we filed the complaint.

Mr. GEISLER: These are the photographs of the lamp-posts. I suppose you will admit those?

Plffs. introduced two photographs, one showing the post erected by the defendants in the City of Eugene in substantially front elevation, and the other one being taken somewhat at an angle.

Marked "Plaintiffs' Exhibit AA," and "Plaintiffs' Exhibit BB."

Defts. admit that these posts are erected, at the points indicated in the photographs, in the City of Eugene.

Plffs. further introduced as "Plaintiffs' Exhibit CC" a photograph taken of the plaintiffs' patented lamp-post from substantially a front elevation: showing the lamp-post in approximately the same position as the defendants' post is shown by the photograph "Plaintiffs' Exhibit AA."

Q. Mr. Grelle, please explain what, if any, difference it would make in the manufacture of posts if you had an outline before you such as shown on "Plain-

tiffs' Exhibit Y," whether you were told that it should be made square in cross-sections, or octagonal, hexagonal, or circular?

I mean in the method of manufacture, more especially what changes it would necessitate, whether you could keep the same outline or would have to change the outline by reason of making it circular instead of square, or changing from circular to square, or hexagonal or octagonal?

A. You could keep the outline exactly the same whether it was round or square or octagonal.

Q. State what preparations, if any, you made in your own shop—I mean, the shop of the Independent Foundry Company—with a view of manufacturing these posts.

A. After we had the working drawings, of course, we made patterns for the different parts, made flasks to make the molds in, made core-boxes to make the cores; and we had to do all of that to get ready to make the posts at all, before we made the first post, and then duplicated the flasks so as to make them in quantities.

Q. State whether or not that imposed upon you any expense in getting ready for this manufacture.

A. Of course.

Cross Examination.

By Mr. SKIPWORTH:

What relation do you say you bear?

A. I am president and manager of the Independent Foundry Co., a corporation.

Q. And you say the corporation has given you the exclusive license to sell and manufacture these posts?

A. No, I don't believe I said that.

Q. What did you say about that?

The Independent Foundry Company has the exclusive right and license to make and sell the type "S" posts.

Under the patent, they got that from me.

I claim to have invented and designed the post.

I also claim that the City of Eugene is infringing the patent on type "S", on your type "S" post.

Q. Now, that is the post that you claim that the city is infringing. Have you a patent for the type "S" post?

A. Yes.

Q. Will you please produce it?

Mr. GEISLER: It is in evidence here as Exhibit "S".

Q. Is Exhibit "S" the patent of your five-light post?

A. Yes.

Q. That is the patent you are claiming we are infringing?

A. Yes.

Q. Your exhibit "S" patent?

COURT: Is that a five-light post, Mr. Grelle?

A. Yes, sir.

COURT: That is a four-light that is shown there, but the other light is hid?

In this view, yes, sir. Directly at the post, at the front light, that is, this center light, these being at

right angles to it, the fourth light, in a direct straight line view, would be immediately behind that same globe.

Q. So the patent dated March 12, 1912, which is your Exhibit "S" represents the five-light type "S" post which you claim the City of Eugene is infringing? Is that correct?

A. Yes.

I had first a conversation with Mr. Meyers in reference to putting in the street lights for them in the City of Eugene.

A. I think that is shown in the testimony, according to the date of the letter, I think it was about November 26th or October 26th, about the date of that first letter. It refers in that letter to the conversation we had had the previous day. I had that conversation in Portland, with Mr. Meyers. This conversation I referred to in the letter. Afterwards I had a conversation with Mr. Meyers in Eugene with reference to the same matter.

Q. At that time Mr. Meyers exhibited to me the plans and specifications of a post which he designed. He also showed me the details. That conversation was probably a week or so before he sent the blueprints. Probably a week prior to Mr. Meyers' letter of December 7th to the Independent Foundry Company he advised me that he would enclose the prints and specifications covering his design for post. It was before I had made any competitive bids or submitted any prices to the city.

Q. Now, you didn't apply for your patent on this

type "S" post until about January 2, 1912?

A. No.

Q. When did it first come into your mind to apply for a patent on this post?

A. I had that in mind when I laid the post out.

Q. When did you lay the post out?

A. In September or October.

Q. Of the same year, 1911?

A. Yes.

Q. Now then, in any of these conversations with Mr. Meyers, and particularly at the time you examined his specifications of the post designed by him, you didn't tell him that you were contemplating applying for a patent on your type "S" post?

A. No.

Q. At the time you submitted the bid to the City of Eugene you did not tell the city that you contemplated applying for a patent on your post?

A. No.

Q. The first intimation that the city had, then, that you had applied for a patent was in January, about the 11th of January?

A. The date of my letter to that effect, yes.

Q. Yes, your letter to that effect. Now, that is the first advice you had given the city that you had applied for a patent or intended to apply for a patent?

A. Yes.

Q. Is that correct?

A. Yes.

Q. You submitted your bid to the city by letter dated December 9, 1911, and you applied for your

patent January 2, 1912. The city advised you that they had given this contract to a local firm, did they not?

A. Yes.

Q. Well, isn't it a fact, now, Mr. Grelle, that, being disappointed at not getting this bid, and after you had been advised that the bid was given to a local firm, you concluded you would apply for a patent on this post?

A. The action of the Water Board on that point hastened my applying for it. I didn't have any other need of making immediate application.

Q. Why didn't you advise the City of Eugene then that you intended to apply for a patent on this post?

A. That would not have been to my interest.

Q. That was the reason that you didn't advise them?

A. Yes, sir.

Q. Don't you think it was very much to the city's disadvantage not to know that you intended to apply for a patent?

A. None whatever.

Q. You permitted the city to let this contract for the manufacture of these lights, and you bid upon the contract knowing that you intended to apply for a patent on your post?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Why wouldn't it have been to your interest to advise the city that you intended to apply for a pat-

ent?

A. When I made my quotation to the city on the two types of posts, I put the figure so low that I felt it was almost sure to be let to me. I did not use any patent that I had in holding the prices on the post up. I made my figure on as low a competitive basis as I could afford to manufacture the post.

Q. You say in your bid: "We propose to furnish you ornamental street posts, as per your specifications of December 7th, 1911, and according to your drawings of your standard ornamental posts as follows: Approximately 92—5 light posts \$32.00 each." At the time you made this bid, did you then intend to apply for a patent on your post?

A. When I made my quotation?

Q. Yes, to the Water Board?

Q. Isn't it a fact you didn't intend to apply for a patent until after you were disappointed in not obtaining the contract for the manufacture of the city's posts?

A. If I had secured the contract for the posts as ordered by the Eugene Water Board I would have had the design of the type "S" post patented anyhow.

Q. When did you conclude that the post designed by the city was an infringement upon your type "S" post?

A. My opinion on that point was formed the minute I saw the design of the post.

Q. Did you advise the city or say anything to Mr. Meyers about that?

A. I answered that before by saying that I did not

think it was to my interest to do so.

Q. Well, you didn't do it?

A. No, I did not do it.

Q. You wanted the city to go ahead and manufacture these posts?

A. No, sir, I did not.

Q. Well, then, why didn't you tell them?

A. I gave the city notice that I did not want them to go ahead and manufacture those post.

Q. That was after the contract was let?

A. Yes, sir.

Q. And after these bids?

A. Yes, sir.

Q. Well, why didn't you do it before?

COURT: Was that after the Eugene people had manufactured the posts?

A. It was before they had manufactured any of the posts.

Q. It was after the contract was let?

A. After the contract was let, yes, sir.

Q. The contract was let on the 16th of December?

A. Yes, sir.

Q. And do you know when the city commenced to manufacture the posts?

A. I do not know definitely, no, sir.

Q. Well, do you know, as a matter of fact, that at the time the city received this notice the contract had been let, portions of the posts were completely finished, and all of them in course of construction?

A. I do not know that.

Q. You don't know that to be the fact?

A. No, sir.

Q. Now, then, in designing your post, did you design it from cuts of other posts?

A. No, sir.

Q. Isn't your type "S" post an infringement upon the "Cutter's Boulevard Post?"

A. I don't think so.

My conversation with Mr. Svarverud took place about December 2, 1912. Long after the city's posts had been manufactured and part of them placed upon the streets? I had no conversation with Mr. Svarverud about the time the contract was let. Nor any other conversation except the one which I have related.

Q. That took place about December 2, 1912?

A. That is all.

Q. Is that correct?

A. Yes.

I did not submit the plans and specifications of my post to the Eugene Water Board or to Mr. Meyers. I only submitted a photograph of my post. I showed Mr. Meyers the sketch that I referred to in my early testimony, and I sent him a photograph as per his request of the post that was represented in the drawing that I showed him.

Q. Well, how elaborate a sketch did you show Mr. Meyers?

A. A profile view.

Q. Just a profile view?

A. Yes, drawn to scale.

Q. Now, was the profile view that you showed Mr. Meyers similar to a view of that kind, although

it being your post?

A. It was a view taken in the same direction as this post is.

Q. And a similar view?

A. Yes, sir.

Q. That is what you mean by a profile view?

A. Yes, that is what I mean by a profile view.

Q. But you didn't show him any of the plans or details of your post?

A. What do you mean by details?

Q. Well, I mean the plans of your post similar to the details and specifications of the post that you introduced here of our post.

A. No.

Q. You only showed him a profile view and a photograph?

A. A photograph and the original drawing of the post.

Q. The original drawing?

A. Yes.

Q. That would show the post complete?

A. Yes.

Q. You didn't show any of its separate parts?

A. No.

Q. Now, then, you claim that the city's post infringes your type "S" post. I wish you would please explain to the court in what manner it infringes your patent or post. Explain in detail.

A. The drawing Exhibit "Y" outlines in a better way than you can by words showing the similarity between the defendant's post and our type "S" post.

The view shown is of the outlines of the post, and is what would be impressed upon the eye by the post as a whole, not looking into the details or the method of manufacture or construction. By referring to the drawing, the posts are similar in every respect.

COURT: Would that be the case if you saw those two posts standing on the street, and looked at them as they stood?

A. Unless you got in front of the post and examined the details of it.

COURT: Suppose you looked at them across the street?

A. It would make the same effect.

COURT: If the posts were standing side by side, would they have the same similar view that they have there in the drawing?

A. Yes, sir.

Q. Well, why do you say that, Mr. Grelle?

A. Because the effect upon the eye at a distance of across the street would be the same as though the thing were either silhouetted or a photograph were taken of the same on the same line, and the photograph neglected to show the application of details on the faces that come into view individually.

Examination by the Court.

Q. In that case, you would see the square face, wouldn't you? You would see the square arm?

A. I don't believe so, at that distance.

Q. Well, suppose you got close enough to see them, then, halfway across the street, or within ten

feet?

A. Unless you were examining the post to see whether that arm was square or round, the first impression on the eye would be the shape of it, that is, the lines of it, and not the cross-section of it.

Q. If you were walking down the street and the posts were alternating, would your eye take notice of it as you were going along, you being a drafter of such posts as that?

A. If I was going down the street and examining them, yes.

Q. Suppose you were passing along, curiously taking notice as you went along of the things that you passed, would the distinction present itself to you as you passed along?

A. I believe it would to me, Judge, although I don't think it would to you.

Q. I have an idea it would to me, because I take close notice of things.

A. Of course, being in this line, I examine all those things, and take more minute recognition of the details of those things than I would of some other things that I am not interested in at all.

COURT: I must say that I do not know as yet what the rule is in determining the distinction between the different types that might be patented, and how near the resemblance must be in order to be an infringement on the patent, but we will get to that later.

Cross Examination continued.

Q. Mr. Grelle, you don't pretend to say that a

casual observer wouldn't notice the difference between a square post and a round post, do you?

A. Well, that is rather indefinite.

Q. No, it isn't. You say now that the impression would be the same—the impression to the eye—half-way across the street or within ten feet it would be practically the same; it would make no difference whether the arms of the post were square or round?

A. Pardon me, I didn't say within ten feet the impression would be the same.

Q. What distance did you say the impression would be the same?

A. Across the street?

Q. Across the street?

A. Yes.

Q. Well, now, I wish you would observe this post—the base of the city post is square and paneled, isn't it?

A. I believe it is meant to represent square and paneled, although that drawing wouldn't indicate that it was either square or round.

Q. With a square base. That is not a round base, is it?

A. There is nothing on the drawing to prove that it is a round or a square.

Q. Well, you can see it with your eyes, can't you? You can see it is square?

A. No, I can't see it with my eyes. I have to use my imagination.

Q. I hand you a photograph of the city's post, and ask you to examine the base of it, and state whether or

not it is round or square.

A. It is square.

Q. Examine your Exhibit "A", which represents your post. It is round. Can you see any similarity between the base of the two posts?

A. Yes.

Q. In what way?

A. That they are approximately the same proposition. The outlines are very similar.

Q. Now, would those distinctions appear to the ordinary casual observer?

A. I think so, yes.

Q. Your post is round and fluted, isn't it?

A. Yes, sir.

Q. That is, the base of it. And the city's post is square and paneled?

A. Yes, sir.

Q. The city's post has a square base—foundation, you might call it, or molding around there? I don't know what you would call it technically.

A. Yes.

Q. Yours is round, isn't it?

A. Yes.

Q. Now, then, compare the arms of the posts. The arms of the city post are square, aren't they, with a panel in the center?

A. They are square, yes.

Q. And yours are round?

A. Yes.

Q. And the neck of your post is round, isn't it?

A. Yes.

Q. And the city's is square? Is that correct?

A. Yes.

Q. Now, then, examine this model here, which represents the top of the city's post. Compare the arms with the arms of your post, type "S", and state to the court in what way they are similar.

A. In what way they are similar?

Q. Yes.

A. The shape of the arms, in its projection from the body, from the head, is on the same lines as ours. It turns down to the globe-holder, which is practically the same shape. I don't believe I could show the difference in the bell.

Q. In what way do they differ?

A. They differ in that the cross-section of the arm is on a square instead of a circular and elliptical, and the curve of the arm just above the socket is somewhat sharper than the curve of the arm on my post.

Q. How about the panels on the arm of the post?

A. The panels and the square corners impress the eye with lines running in the same directions that the flutes give to the eye on my post.

Q. How about the neck of the post?

A. The neck of the post, the collar is in approximately the same position as they are on the type "S". They are square instead of being round.

Q. The neck of the type "S" post is round?

A. Yes.

Q. And the arms of the type "S" post are round, without any panel?

A. They are round and elliptical.

Q. How about this part, the top of the post?

A. That is what I considered the collar in my last answer.

Q. Is that part of the post round on yours?

A. That part is round.

Excused.

WILLIAM C. SCHMITT, called as a witness on behalf of the plaintiff, being first duly sworn, testified as follows on

Direct Examination.

My name is William C. Schmitt. My age is 27 years. My residence at the Multnomah Clubhouse. My occupation is an engineer. I am a graduate engineer, also conversant with drawing. Mechanical drawings, especially. I have seen these two blue-prints before, marked Plaintiffs' Exhibit "U" and "V" respectively. I have also seen these two blue-prints before marked "Plaintiff's Exhibits "W" and "X," also this drawing marked "Plaintiffs' Exhibit Y." I have checked over the outline and dimensions of the drawing marked "Plaintiffs' Exhibit Y" with the blue-prints, Plffs. Exhibits "U" and "V". I did it in the case of one by making—actually scaling with a compass, and found that all points corresponded as accurately as could be accomplished. In the case of the plaintiff's post I had to take the measurements from scale, and found that they corresponded to this drawing as accurately as could be done.

COURT: Both posts made from the same scale, do you say?

A. Made on the same scale, but there are certain dimensions that are different—the length, for instance.

COURT: Well, the arms?

A. I didn't compare the two of them one with the other. I merely compared each one with the original drawing for each one.

COURT: That indicated, then, that they came from the same scale, or made from the same scale, each post, with the exception of some difference as to base, etc.—length of base, etc.

A. Well, I don't know what scale this is drawn to. It is given on this original drawing as one inch to the foot. Now, the outline drawing here corresponds to that.

COURT: Is one a copy of the other?

A. Yes, one is a copy of the other.

Mr. GEISLER: I would like to say to your Honor that our object in having this drawing "Exhibit Y" prepared was to place both the plaintiffs' and the defendant's post before the court drawn to the same scale, which makes the comparison much more simple than if one was on a large scale and the other a small scale.

COURT: I understand. And Mr. Schmitt's testimony is only to verify the correctness of the drawings and the dimensions, that they were drawn to the proper scale as stated by Mr. Grelle.

Cross Examination.

Questions by Mr. SKIPWORTH:

I am a graduate engineer from Notre Dame Uni-

versity, South Bend, Indiana, graduated in 1910. I have worked several summers before I graduated as assistant to civil engineers, during the last two years I worked for several months for the Warren Construction Company, and for about one year and nine months I have been doing a great deal of work for Mr. Geisler.

I am in Mr. Geisler's office now.

Q. Now, referring to "Plaintiff's Exhibit Y," you have not run those to the same scale, have you? I mean by that, the identical scale on which the post is actually designed?

A. This plaintiff's post I have, but not the defendant's.

Q. As a matter of fact, the dimensions of the posts are not the same, are they?

A. I couldn't say about that.

Q. Did you ever measure the dimensions of the defendant's post?

A. No, sir, I have not.

Q. Have you ever measured the dimensions of the plaintiff's post?

A. Yes, sir, I have, as detailed in these blue-prints.

Q. Well, have you the defendant's post detailed in the blue-print?

A. No, sir, I have not.

Q. That doesn't show a completed post, does it?

A. It shows an outline drawing.

Q. What do you mean by outline? Define that.

A. An outline would be merely the outside lines of a figure, without respect to any detail inside of

those lines.

Q. It would be very easy to enlarge the post of the plaintiff to the dimensions of the defendant's, or reduce the defendant's post to the dimensions of the plaintiff's post, in your outline?

A. It would not and keep the same—when you reduce you have to keep all parts in the same proportion.

Q. That doesn't show the post completed?

A. It doesn't show the inside detail.

Q. Nor doesn't show the outside truly, does it?

A. Yes, it shows the outside lines.

Q. Now, referring to the plaintiff's post, the defendant's post which is shown by Plaintiff's Exhibit "U" there on this exhibit, the base is shown to be square?

A. Well, that is not shown to be absolutely square.

Q. It is not round, is it?

A. Well, that could be round from this view. It would require another view to show that that is square.

Q. If this post is square, then what would you say as to this being a fair representation of the defendant's post?

A. That is a fair representation as far as our plans go.

Q. If the post of the plaintiff is round, then what would you say as to Exhibit "Y" being a fair representation of the plaintiff's post?

A. Well, as far as our plans go, because you could not tell from these drawings whether those two bases

are round or square.

Q. You couldn't tell from the drawings whether the bases are round or square, could you?

A. No, sir. They could be either.

Q. You couldn't tell from the drawings as to whether or not the arms are round or square?

A. No, you couldn't.

Q. They could be either?

A. Yes, sir.

Q. You couldn't tell from the drawing as to whether or not the neck is round or square?

A. No. They wouldn't be restricted to being round or square; they could be of any shape.

Q. And you cannot tell from the drawing as to whether the bases of the posts are paneled or not, can you?

A. No.

Q. Then, from those drawings it would be impossible to tell the view of that post, or the appearance to the eye, if completed?

A. The general outline. You wouldn't be able to get any idea as to the panel work, or the fluting, or any of the details?

Q. Or how the post would look after completed?

COURT: That post has panel-work at the base. Doesn't that show square?

A. Well, that wouldn't necessarily have to be square, because a round base could have a design so that a frontal elevation of it would show up exactly the same.

Q. Now, referring to the post on this Exhibit "Y,"

you cannot tell from the drawing how the post would look if completed?

A. Only as far as general outlines go; not as far as details.

Q. Or appearance?

A. Well, that would depend upon what appearance, what would constitute appearance, some.

Q. Now, referring to the defendant's post, you say the base could either be round or square?

A. From these drawings it could be any shape at all.

Q. From these drawings, yes. Then I say, you cannot tell from these drawings how the post would look if completed?

A. No, not as far as details go; only on general lines.

Redirect Examination.

Q. For the information of the court, I would ask you, Mr. Schmitt, given any outline of a figure, to state whether it would be possible, in developing that figure later on, to make it square, octagonal, hexagonal, circular, or any other form in cross section, and whether or not the outline would in any way vary?

A. No, sir, the outline would not vary.

Excused.

Plaintiff rests.

Mr. GEISLER: I have not introduced any evidence at this time in regard to possible profits and so on, as I assume that will come in afterwards, when it is determined whether or not the infringement exists.

COURT: Very well.

DEFENDANT'S EVIDENCE.

Y. D. HENSILL, called as a witness on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. PIPES:

I reside in Eugene, Oregon; I am an architect.

A. I have been an architect about 23 or 24 years—24 years—practicing.

Q. In connection with your work as an architect, are you skilled in the work of designing?

A. We have a good deal of designing to do.

Q. Have you ever taken any training in any school?

A. I had two years training at Oakland High, and nearly two years at Berkeley. I am actively engaged in my profession at the present time.

I have seen the lamp-post put up by the City of Eugene, the post that is in dispute here, the one that was manufactured by Grosse Brothers.

I am not familiar with the "Type S" post that the plaintiff in this case claims to have patented.

Q. Will you please examine the type "S" post, and say if there is anything new or novel in the design of that base to that post; if that is known to designers—has been; if that is a recognized design among architects and designers?

A. There is nothing unusual about it.

I think I have observed other lamp-posts quite sim-

ilar.

There is nothing new in fluted columns, these have been used long before lamp-posts were.

A. I think I remember fluted lamp-posts when they were used in connection with the old gas lamp-post, gas lights, before electric lights were used.

These fluted columns have been used in buildings for a good many hundred years.

Q. Now, will you examine the photograph of the city's post, and explain to the court, from the designer's standpoint, the difference between the two? You can take this for the city's post, the profile.

Mr. GEISLER: That is not in evidence yet.

Mr. GRELLE: That is Exhibit "B".

A. There is a perceptible bit of difference in the two posts.

Q. In what respect, now, commencing at the base?

A. One has a square base, with very little sub-base or moldings on the base. The other is more ornamental. One base is square with square panels.

Q. Say "Type S" and "the city's" to designate the different posts.

A. The type "S" post has a round base, with more moldings than the city's post. The type "S" post has a fluted base. The city's post is square, with a square sunk panel. The type "S" post is more ornate at the base of the shaft than the city's post. Both posts have fluted columns. Type "S" post has a round cap or head. The city's post has a square, with sunk panels. Type "S" post is ornamental. There is a difference in the shape of the arms. One is round—the type

"S" post is round, increasing to elliptical, while the city post, the city arms are square, with a square panel, or with a sunk panel shaped similar to the outline of the arm.

Q. Well, would the top of that post present any difference to an ordinary observer?

A. I believe it would to a casual observer.

Q. Well, would it to an architect or designer?

A. It surely would.

Q. For quite a distance?

A. Yes. It looks like most any one could see the difference in the post in looking at it, because there is a difference in looking at the perspective of a square or rectangular column or post and looking at one that is round.

Q. Do you think that difference would be perceptible as far as across the street?

A. I do.

Q. Have you noticed any lamp-posts that are similar to type "S," as much similar as the city's lamp-post?

A. I think they are somewhat similar right here except the base.

Q. Right here in Portland?

A. Lower base.

Q. As a matter of fact, all lamp-posts have to resemble each other to a considerable extent, don't they, from the nature of things?

A. Yes. All lamp-posts have a base and a shaft. There is a little difference in the head or the shape of the arms, perhaps.

Mr. PIPES: I will offer in evidence the "Cutter's Boulevard Lamp-post" for comparison.

Marked "Defendants' Exhibit 1."

Q. I hand you Defendants' Exhibit 1, which is a cut or photograph or representation of Cutter's Boulevard Post, and ask you to state if there is as much similarity between that post and type "S" as there is between the city's post and type "S", and to point out some of the similar features.

A. There is more similarity between Plaintiff's Exhibit "CC" and Defendants' Exhibit "1" than there is between Exhibit "CC" and the city's post.

Q. In what respect?

A. The bases in these two posts are round. There is little fluting on the base of Exhibit 1, the same as the base of Exhibit CC. The bases are apparently about the same proportional height. The shafts of both columns are round and fluted. The arms are similar. Exhibit 1 seems to be elliptical and round. There are more moldings under the socket supporting the light on Exhibit 1, similar to Exhibit CC.

Q. Well, now, just from the standpoint of a casual observer, would you say that there was as much similarity between the Cutter's post and Plaintiffs' type "S" as there is between the Cutter's post and the city's post?

A. There is more similarity between these two.

Q. Well, supposing the city's post is an infringement on the plaintiffs' type "S", what would you say about the Cutter's post also being an infringement on it?

A. I would say one of this would be nearer an infringement on the other than that would be to type "CC" or to Exhibit "CC."

Panel work in designing, has that been recognized for years?

A. It is an old design.

Q. And this elliptical shape for arms, is that a new design?

A. I don't think so.

Q. Is there anything new or novel about any of these lamp-posts, from the designer's point of view, considering the state of the art?

A. I don't see anything unusual or novel about any of them.

Q. Those are all well recognized figures that have been used and it is just simply the combination that makes the difference? Isn't that a fact?

A. The combination makes the difference. They all have foundation, base and shaft, and the arms and the head.

Q. And all lamp-posts in use are constructed practically that way? Isn't that a fact?

A. A very similar way.

COURT: How long is that Cutter's post supposed to have been in use?

Mr. SKIPWORTH: Two years, your Honor, according to the deposition.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Hensill, are you at the present time in any

way officially connected with the City of Eugene?

A. I am a councilman at the present time.

Q. You haven't made a specialty of designs on lamp-posts, have you?

A. No, sir.

Q. Now, when you speak of the dissimilarity as between the plaintiffs' patented lamp-post and the defendants' lamp-post, and the city's, you have in mind the details, do you not?

A. No, the general appearance of the post.

Q. How about the outline? To assist you in answering that question I have placed before you a sketch which is in evidence as Plaintiffs' Exhibit "Y." The drawing on the left-hand side represents the plaintiffs' lamp-post, that on the right the defendants' lamp-post as erected in the City of Eugene. I would ask you to look over the outline carefully, and state whether it is not a fact that the outline is substantially the same in the two posts.

A. They are quite similar except the base.

Q. Now, is it not a fact, with a given outline, I could say to you, "Mr. Hensill, I want that reproduced in square, or in octagon, hexagon, circular, or elliptical, and you could design a lamp-post to be manufactured from that outline in each case?"

A. Yes.

Q. Now, is it not a fact that there is considerable variation in ornamentation which is imposed upon an outline of any kind? Take, for example, a house may have the same outline, and yet the details with regard to ornamentation may be infinitely varied, may

they not?

A. Yes.

Q. Mr. Hensill, you are acquainted in the art of design with what is known as the classic arm, are you not?

A. I don't know whether I know exactly what you mean by a classic arm.

Q. Well, I will give you an example of one here. I believe you call it a console, do you?

A. Yes.

Q. That is the name, I believe, the architects use. But what I had reference to as a classic arm was, for instance, one as sketched here at the left hand side of that sheet of paper, the upper left hand corner, Mr. Hensill.

A. It would depend on what style you were designing it in.

Q. Well, I mean, that is one type of classic arm or console, isn't it? It goes back to the old classics.

A. Yes.

Mr. GEISLER: For the purpose of having the witness' testimony clearer, I am going to offer the top of that sheet in evidence. I will offer the whole thing.

Marked "Plaintiffs' Exhibit DD."

Q. The usual way that such a figure is drawn is by scrolls at both ends, is it not, as, for instance, shown in the upper left hand figure here?

A. Not necessarily.

Q. Well, I mean that is a very common way of producing it, is it not?

A. There is nothing unusual about it.

Q. No, I say it is not unusual; that is a very common way, to the contrary, isn't it? This one right here, the upper left hand corner?

A. Yes, it is seen quite often.

Q. Surely. Now, refer to the upper left hand corner of that same sheet of paper, and we see a design which is also substantially what I have termed a classic arm, or console? Isn't it?

A. Well, it is not as complete as the first.

Q. Not as complete as the first; and the reason of its lack of completeness is by reason of the omission of the scroll at the right hand end?

A. Yes.

Q. Now, I would call your attention to Defendants' Exhibit 1, and ask you to examine that photograph. Now, is it not a fact that the arm there shown of that lamp-post is on lines as suggested by the classic arm or console, such as we have just referred to?

A. It is similar to one of them.

Q. The one it is similar to is the one at the left hand upper corner of that sheet, which has the scroll at one end omitted?

A. Similar to that, yes.

Q. Now, do you mean to say to the court that there is identity between the arm as forming a part of the post, of the plaintiffs' lamp-post, and the classic arm shown by Defendants' Exhibit 1?

A. There is a similarity, except where the console leaves the head of the post.

Q. It appears in evidence, according to your state-

ment, that Defendants' Exhibit 1, of a lamp-post previously existing, has arms which in their contour follow the classic type of scroll or classic arm, whichever it may be. You agree to that, don't you? That in other words, the lamp-post here of Defendants' Exhibit 1 has arms which are suggestive of the classic type?

A. Yes, there is a suggestion of the classic type in the shape of that.

Q. Now, then, the classic type that I have in mind at this time is that which has the scroll on both ends, or its modified form as shown in Defendants' Exhibit 1, where the scroll at one end, at the extremity of the arm, is omitted. Now, do you mean to tell the court that the classic arm is suggestive of the arm employed by the plaintiff in his patented lamp-post?

A. The shape is similar.

Q. Is there anything classic about it?

A. The shape is similar to the arm in this post. It is not quite so ornate. It depends on what style you are designing. There are several classical styles.

Q. Yes, but I have reference to this one particular classical style, and I want to know whether, as a matter of fact, the arm of this lamp-post, it being admitted here in evidence that it is of the classic arm type, would in any wise suggest this one here.

A. With the ornamentation that is used on that, fluted, and with the brace here, there is a little suggestion of classical to that.

Q. A little suggestion. Well, is the suggestion that you find merely because of the intermediate por-

tion or the middle portion of the arm between the two scrolls being shown here? Is that what you have reference to when you say there is a little suggestion—just this portion here between the root and the extremity?

A. The suggestion is the ornamentation that surrounds this console or arm similar to the ornamentation on that.

Q. I don't care anything about the ornamentation, Mr. Hensill. What I want to get at is the outline. Here we have, I am referring to a classic arm, one that has a middle portion with a scroll at one end, that we say we know to be of a classic type; and in this lamp-post it was followed here by the persons who designed this Defendants' Exhibit 1, and we find that the scroll at the extremity of this classic arm or console is omitted, is it not?

A. The scroll is omitted on Exhibit 1.

Q. Yes, the scroll is omitted. Now, is there anything which the classic arm would suggest with regard to the plaintiffs' design except the middle portion; that is to say, the portion between the two scrolls at the ends, the outline of it, mind you? Do you understand?

A. I am not clear what you are trying to get at now.

Q. Well, you say there is a little similarity. Now, where is that little similarity to be found?

A. In the shape of the console from the point it leaves the head here to the socket here, in the shape.

Q. In the mere fact that it is making a little curve

there?

A. It has that irregular curve and drop similar to this.

Q. That resemblance is a very slight one to the classic production of an arm such as I referred to a moment ago, is it not?

A. Very slight.

Q. It is an incomplete one?

A. The comparison is slight.

Q. Now, then, the fact is, however, Mr. Hensill, that the plaintiff's type of post as an outline is suggestive of the defendants' outline of post, is it not?

A. Merely in the outline.

Q. In the outline, yes. That is all.

Redirect Examination.

Q. Is the outline of the post as represented there any fair representation of the finished post?

A. No, sir.

Q. Wouldn't the outline of any post necessarily be very similar?

A. The outline might be very similar, because the outline shows no ornamentation, and the finished post be very different.

A. E. DOYLE, called as a witness on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. PIPES:

I am an architect. I live in Portland.

Q. Have you done any work in Portland?

A. Some.

Q. Where have you worked here?

COURT: I don't think you need qualify Mr. Doyle. He is an architect here of standing in the community.

In connection with my work as an architect, designing is a part of my training.

Q. I hand you pictures of the city's post and of the plaintiffs' post, and ask you to state where they differ, in what respects.

A. Have you a photograph of this one, so that you can see them together? One is a drawing, one is a photograph. It is rather difficult to compare them intelligently that way.

(Witness is handed small photograph.)

Mr. SKIPWORTH: This is the plaintiffs' post and this is the city's post.

Will you please look at the photograph of the city's post and of the plaintiffs' post, and describe the difference between the two posts?

A. One post apparently has most of the parts square, and the other seems to be round. One is a considerably better designed post than the other.

Q. Which one is the best?

A. This large one. That is the Plaintiffs' Exhibit "E." The other looks like a poor imitation.

Q. The defendants' post?

A. Really, yes. It is square.

Q. You say the plaintiffs' post is the best design?

A. Yes, I should say so decidedly.

Q. That is from an artistic standpoint?

A. From an artistic standpoint decidedly.

Q. Would a person likely be deceived by the city's post if he wanted to purchase—

A. Any one with any artistic discrimination at all would.

COURT: Would be deceived?

A. Decidedly so, I think.

Q. You don't understand the question, do you?

A. Would be deceived between one and the other. Well, if I was contracting to buy that post, I would certainly not be deceived if I got this one.

Q. Well, that is what I am trying to get at. You would know the difference between the two?

A. Yes, decidedly so.

Q. Well, do you think that that difference would occur to a man who was not so skilled as yourself, to a casual observer, the difference between a square and a round post?

A. Yes, I should say the average person would notice a difference. As you look at it, the longer you look at it the more things about it you see that are different.

Q. Have you seen the posts—the full sized post?

A. I have not.

Q. This is a representation of the top of the city's post—a true representation—that you see before you here. You might compare that with the photograph of the plaintiffs' post, and say whether there is any similarity there that would be likely to deceive the public.

A. There is a similarity, but they are not at all

the same, if there is a distinction.

Q. Isn't there a similarity between all lamp-posts to a certain extent?

A. Yes.

Q. That must necessarily be, mustn't it?

A. No, not necessarily. One could have one light.

Q. You have a base and column and a top in all of the lamp-posts, don't you?

A. Yes, but you don't have arms on all lamp-posts. It is not necessary to have a similarity, but there is a great similarity between most public light and street posts.

Q. Between most street posts?

A. Yes.

Q. Well, now, the fluted column that you see there in use in both of these posts, is that a novel and original design, or has that been known to your profession for some time?

A. Yes, there is nothing original about that.

Q. How long has that been known to architects and designers?

A. Oh, I might say two thousand years.

Mr. GEISLER: I might say we claim nothing for the details.

Q. There is nothing very original in either one of those lamp-posts, is there?

Mr. GEISLER: I object to that question. I don't care—I think the witness' answer would be just as good to us; but I don't want to get into this loose way of examination.

Q. Well, I will ask you if there is anything novel,

or new, or original in either one of those lamp-posts, from an architectural and designer's standpoint?

Mr. GEISLER: I will object to that, too, unless you follow it up and show on what the witness bases his opinion.

COURT: He can answer that generally, and you can examine into details if you like.

A. I shouldn't say there was anything particularly novel or original. It is along lines that posts have been designed for a good many years.

COURT: I suppose you are aware that combinations are the subject of patent as well as original designs.

Mr. PIPES: Yes, I am.

Q. Is there anything new or novel in the combination of plaintiffs' post?

A. Oh, I suppose that is a question where you draw the line as to what is new or novel. They are new combinations—there are combinations that I have never seen before.

Q. In the paneling on the city's post, is there anything new about that?

A. No. That is, there is a square base on the city's post, and a round fluted base on the other one.

Q. Well, do you think that the plaintiff would be in any danger of competition by such a post as you say the city's post is?

A. Not with me.

Q. Well, with the public?

A. Oh, I cannot answer for the public.

Mr. GEISLER: I object to that. I don't see how

the witness can testify to the public. He can state what he knows himself, and what he thinks; but that is a great big body—the public.

COURT: He is an expert. He can state his opinion.

Mr. GEISLER: Yes.

Mr. PIPES: Well, I think that is all.

Cross Examination.

Questions by Mr. GEISLER:

You heard the examination by myself of Mr. Hensill when on the stand, in regard to the outline?

A. Yes, sir.

Q. Differences in details?

A. Yes.

Q. What I said about classic arm and console and so on, and what he found to be similar and dissimilar? Do you remember that, Mr. Doyle?

A. Yes, sir.

Q. Do you agree with his statements about that?

A. Well, it seems to me it would require quite a stretch of imagination to see anything classic in that. I would not ever think of it unless it was suggested to me.

Q. Not in the plaintiffs' post?

A. In either one.

Q. Yes, in either one. I agree with you there. But now to you, in these two outlines, Mr. Doyle, is the one suggestive of the other, in your opinion?

A. Yes, of course, they look very similar in outline.

Redirect Examination.

Q. Well, would the outline be a fair representation of the similarity in the finished post?

A. No, I hardly think so. It is not a fair test.

Q. It is not a fair test?

A. No.

C. W. GELLER, called as a witness on behalf of the defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SKIPWORTH:

I reside in Eugene, Oregon. My occupation is secretary of the Eugene Water Board, since approximately April 1, 1912.

Q. Are you acquainted with Mr. Grelle, the plaintiff in this case?

A. I am not personally acquainted with him, any more than I have seen him in the office.

Q. Has he been in the office of the Water Board in reference to his lighting post?

A. Yes, sir.

Q. Did he ever meet the Water Board as a body in reference to placing his type "S" post in Eugene?

A. Not to my knowledge.

Q. You may state whether or not the Eugene Water Board asked for bids or quotations for the manufacture of the light post which was designed by the city.

A. The Eugene Water Board asked for quotations from various firms, Mr. Grelle's firm being one to

which the request was sent.

Q. And you may state whether or not the request was also sent to other persons?

A. (Referring to record) There were four—four firms.

A. Albany Iron Works, of Albany, Oregon; The Eugene Iron Works, or George W. Frazer, of Eugene, Oregon; The Independent Foundry Company, Portland, Oregon; and Gross Bros., Eugene, Oregon.

Q. You may state whether or not the Water Board met and considered these bids.

A. They did, at a meeting specially called for this purpose.

Q. And you may state whether or not the contract was let for the manufacture of the posts.

A. It was.

Q. The post designed by the city. Can you give the date that the contract was let?

A. The Board met on December 12th, 1911, and authorized the President of the Board and Mr. Meyers, the superintendent, to enter into a contract with Gross Brothers. I believe the contract was actually entered into next day.

Q. Have you any means of determining the exact date the contract was entered into?

A. The contract was actually entered into on the 16th day of December.

It was entered into in writing, in duplicate.

The contract was signed on the 16th day of December, 1911, by the respective parties.

To the best of my knowledge, Gross Bros. com-

menced to manufacture, I believe the same day that they were notified that they would be awarded the contract; in other words, prior to the actual signing of the contract.

Q. Do you know when the construction of the posts was completed?

A. To the best of my recollection at that time, the work was of such a nature that practically certain portions of the posts were started first. If I remember correctly, the columns were cast, and then perhaps later on the bases and the heads. And you might say that a good deal of the work was pretty well along towards completion in the early part of January. In fact, they had one post set up for inspection. This inspection was conducted by the Water Board and superintendent very early in January—I think perhaps prior to the 10th, or even the 6th or 5th.

Q. Do you remember how many of the posts were completely manufactured prior to January 11, 1912?

A. I have no definite knowledge of that, excepting that I know that there were numerous parts—columns and bases and heads—lying about the works of Gross Bros. at the time that we made that first inspection. It seemed to me there were perhaps 20 or 30 posts lying around there in various stages of completion. In fact, as time went on, they crowded us to take delivery of them, because their shop room was crowded.

Q. And did the city take delivery of the posts from time to time as they were manufactured?

A. Yes, sir.

Q. How many posts did Gross Bros. manufacture for the city under their contract?

A. The contract called for two type posts. One was a five-light and the other was a one-light post. Of the five-light there were contracted and completed 92; of the one-light 15 posts.

Q. Now, then, was the bid of Gross Bros. for the manufacture of the five-light post in excess of the bid of the plaintiffs?

A. Yes, sir, it was.

Q. How much?

A. On the five-light post it was \$2.00. In other words, plaintiffs' bid or quotation was \$32, while Gross. Bros. was \$34.00.

Q. Why was the contract let to Gross. Bros. and not to the plaintiffs?

A. There are two reasons for that. As I testified, there were two types of post contracted for and built. One was the five-light and one was the one-light. While Gross Bros.' bid was \$2.00 higher per post on the five-light, their quotation on the one-light post was \$5.00 cheaper; so taking the fifteen one-light posts and the 92 five-light posts, there was but a difference of, I believe approximately \$109 on the total order, which the Board would well consider being worth retaining the business at home, subject to home inspection and patronizing home industry.

Q. State whether or not the Water Board took that phase into consideration in letting the contract.

A. Yes, sir.

Q. And what was said about it, if anything?

A. As near as I can recall, that, being the sum total was so close, it was a good deal more advisable to award it to the home industry, for the reasons I have previously stated. That may not be the exact language they used, but it is the sum and substance of it.

Q. You may state whether or not the Water Board desired to inspect the post during the construction?

A. The Water Board, through its superintendent, did, yes.

Q. Was that matter discussed, and if so, what was said about it?

A. I don't recall in exact words, but, to the best of my knowledge, it was that that would be an advantage.

Q. That was discussed at the meeting of the Water Board?

A. I think that it was.

Q. Now, what was the whole contract, or how much was the whole contract price of manufacturing the posts?

A. \$3473.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Geller, do you remember the Water Board receiving a notification from the plaintiff of his intention, or his having applied for patent?

A. I do.

Q. What action was taken upon that notification?

A. No special action of any kind.

Q. Was it considered in any way by the Board?

A. Why, it was brought to the attention of the Board, and discussed, you might say, informally. The opinion seemed to be that there was nothing in it—merely that Mr. Grelle was disgruntled, bitter, and perhaps would seek to use that means to thwart the city in its efforts.

Q. You have got the minutes there, have you, of the Water Board?

A. Yes, sir.

Q. Is it referred to that it was received, in the minutes of that day?

A. No, there is no reference in the minutes to that communication.

Q. It was not put down in the records at all?

A. As a rule, communications are not.

Q. Do you remember of receiving later on a notification of the plaintiff that his patent had been allowed?

A. Yes, sir.

Q. What action was taken upon that?

A. Merely filed.

Q. After you got the final notification, that you got from plaintiffs' attorney, what action was taken on that?

A. Which one do you mean as final?

Q. The one in which you were advised that the patent had issued, and you were told that the city was an infringer of that patent?

A. My recollection now, without referring to the correspondence, is that you people had made an ap-

plication, and to the best of your knowledge you expected to obtain a patent.

Your early communications stated that if your patent was granted you would hold us responsible.

Q. How many light-posts are there in operation at the present time, of the five-light type?

A. I think there are fifty; very close to it.

Q. And you then have material on hand going to put up 42 more?

A. Yes.

Q. That makes the 92?

A. Yes, sir, provided my figure of 50 is correct. I am almost certain it is correct.

Q. Have you a record of when the first post was complete and in public use on the streets there in Eugene? I don't mean any sample posts now. I mean the actual post.

A. No, I have none with me; but I think I have in my office.

Q. I didn't understand that answer.

Q. Have you any record here of the dates of the payments made to the Gross Brothers on this contract?

A. Yes.

Q. Will you kindly give us the dates and amounts of the payments?

A. The first payment, in other words, the first warrant was drawn in favor of Gross Bros. Iron Works March 12, 1912, for \$849.80. I might state in explanation that this warrant also covered an item for other merchandise and labor as well as ornamental

posts. It did not amount to so very much. The second warrant was drawn April 8, 1912, for \$1226.50. That was also for various items. The bulk of it was for ornamental posts. The third and last payment was made May 14, 1912, the amount being \$1410. I believe that was entirely for ornamental posts. I don't think it included any other merchandise or labor. I am not positive as to that now.

Q. Have you a copy of the contract here that was entered into between the City of Eugene and Gross Brothers?

A. I have our copy, yes, sir.

Q. You have it here?

A. Yes, sir.

Q. Will you allow me to see it?

A. Yes, sir.

Mr. SKIPWORTH: We will offer it in evidence if you like.

Mr. SKIPWORTH: At this time the defendant City of Eugene offers in evidence contract between Gross Bros. Iron Works and the City of Eugene for the manufacture of the posts designed by the city, together with the details and specifications attached to the contract.

Marked "Defendants' Exhibit 2."

Q. Could you tell me by looking at your records, Mr. Geller, how many lamp-posts were completed and erected on March 12, 1912, when this warrant for \$849.80 was drawn?

A. The warrant of March 12th was drawn on the basis of the estimate made March 1, 1912, and prior to

and including March 1, 1912, Gross Bros. had completed and we had taken delivery of thirty five-light posts. I mean by that, that perhaps every week we would go down there and take delivery of some posts, in order to give them shop-room. In fact, they annoyed us quite a bit at times by wanting us to get them out of there.

Q. Can you tell us how many lamp-posts were erected prior to March 12, 1912?

There were none on the streets of Eugene at that time.

Q. Did I understand it was based on estimate of February 1st?

A. March 1st.

Q. Have you got any estimate as to February 1st with respect to this contract with Gross Bros. as to work then completed?

The first estimate was made on February 1st. We perhaps knew prior to that how they were coming along, and how they were progressing.

Q. Had you any estimate made January 1st as to how far the work had progressed on the contract?

A. No estimate made with reference to the payment.

Q. What estimate did you make?

A. Well, as I have stated before, we possibly knew, and did know—our office did—from time to time how they were progressing, and how many they had turned out and were turning out.

Q. You mean by that, that you knew they were getting along with the work, but you hadn't any defi-

nite knowledge as to how far it had progressed?

A. Well, at that time we undoubtedly did, because our engineering force was inspecting it constantly once, or more possibly, a week.

Q. You didn't go with them?

A. I did not, but one or two times.

Q. Well, did you go down to the Gross Bros.' shop at January 1st?

A. I don't think I did on January 1st. I did a few days thereafter, at the time the Water Board went down.

Q. What did you find at that time?

A. We found one complete post set up, and, as I stated before, various portions of other posts, that is, columns and bases and heads lying around; the exact number I don't recall at this time.

Q. I see in this contract and specifications there is a provision that changes may be made if called for after the inspection of the first post. Now, when was the first post inspected? Was that the one in January that you had reference to?

A. Why, it was, I would say, between the 5th and the 10th of January.

Examination by the Court.

Q. Mr. Geller, when you submitted your bid to the Albany Iron Works and the other Eugene Companies, what designs did you submit?

A. We submitted the same designs and specifications as were offered in evidence here, and were submitted to the plaintiff in the case.

Q. That was the design that was prepared by

Gross Brothers?

A. No, the design of the post was prepared by Mr Alvin Meyers, superintendent of the Water Board, for the board.

Q. He is the one that designed the post? Now, you submitted that design to each one of these four concerns that you desired to bid upon the work?

A. Yes, sir.

Q. The identical design. You didn't submit the design of plaintiff to either of these concerns?

A. No, not at all; not at all.

Q. Well, you asked plaintiff for a bid upon his design, did you?

A. Yes, we asked him—we told him, to the best of my recollection, in the correspondence that he could, if he wished, submit a quotation on his own type of post—if he wished.

Q. Well, you didn't intend to adopt that without giving these other concerns a chance to bid upon that, did you?

A. No intention that I know of. Oh, you mean on the type "S"?

Q. Yes.

A. I don't think there was any intention of that kind.

Q. Suppose the type "S" had given you such a low bid as it would have been to your interest to adopt that type, and to adopt their bid, would you have adopted that bid without giving the other concerns a chance to bid upon that type as well as upon the Meyers type?

A. Well, that would be all subject to the action of the Board, of course. Just what action they would have taken, I would not know or be prepared to state.

Q. Well, what was your purpose, then, in submitting to the plaintiff for a bid upon type "S" and not submitting the same thing to the other concerns?

A. I believe there was one or two members of the Board that rather liked Mr. Grelle's design better than they did ours. While I am not positive at this time, perhaps that is the reason the bid on their type "S" post was asked for.

Q. Well, was it agreed by the Board—did the Board adopt the Meyers type before asking for bids, as the type to be erected on the streets?

A. They practically had, yes, sir.

Q. And then they asked the plaintiff to give a bid upon the "S" type simply to satisfy the plaintiff, and not with any intention of adopting his bid if it had been made?

A. Well, I don't know just perhaps what the ultimate intentions might have been in that respect, any more than I have stated.

Q. (Cross) Just one question: Is it not a fact that the City of Eugene had in the fall determined to introduce an electric lighting system there and buy lamp-posts for that purpose? They had determined to do that?

A. Oh, yes.

Redirect Examination.

Q. Mr. Geller, the Water Board never did have in its possession the details and specifications of the

plaintiff's type "S" post?

A. Not to my knowledge. I am satisfied they did not, any more than from the photograph.

Q. As I recollect it, Mr. Grelle sent the Eugene Water Board a photograph of his type "S" post?

A. Yes, sir.

Q. But not the plans or details of his post?

A. Never any around there that I knew of. I think if there had been, I would have known it.

Q. You would have known it?

A. Yes.

Q. Are you the custodian of the records of the Water Board?

A. Yes.

Q. Its books and papers and correspondence?

A. Yes, sir.

COURT: Could the plans and details have been drawn from that photograph?

A. Why, I doubt if any satisfactory plans could have been drawn.

COURT: You are not an architect?

A. I am not an architect or anything of that kind. Excused.

ALVIN MEYERS, called as a witness on behalf of defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. SKIPWORTH:

I am superintendent of the Eugene Water Board, and have been since some time in September, 1911.

My duties are, briefly stated, superintending the operation and construction of their electric lighting plant, street lighting system, and the water works plant—water works system. I am an electrical engineer, graduated from the University of Wisconsin.

Q. You may state what experience you have had since that time—just the number of years, in a general way.

A. Well, I have been out since 1901, practically 12 years, from college. I have been in active practice ever since, largely in the design of power plant work, and city work, distribution lines. I had charge of the City of Eugene's electric plant. I am acquainted with Mr. Grelle, the plaintiff in this case. I designed the post known in this case as the city's post. I designed that post the latter part of November and the first part of December, 1911. I drew the specifications, and the details were worked out under my supervision, in my office, by men employed by me in the city.

The plaintiffs in this case did not submit to me their plans and specifications of their type "S" post. I have never had in my possession any of the plans or details or specifications of plaintiff's type "S" post. I submitted to the plaintiff the plans and specifications in detail of the post designed by me, known in this case as the city's post. Mr. Grelle was in our office a short time before the plans were finished, a few days before, and the plans and specifications were mailed to Mr. Grelle. I went into the detail of the plans as they were laid out on the drafting board. The plans were not finished so as to secure prints from them at that

time. The plans were practically finished, but the tracings were not made, so that the prints were not in readiness to be taken. But the details of the working parts, working drawings, were finished at that time.

Q. Did you explain them to Mr. Grelle?

A. Yes, sir. I believe I went into them quite thoroughly.

Q. Did he say anything to you about applying for a patent on his type "S" post at this time?

A. No. He offered no suggestion of that character whatever.

Q. Had you seen a photograph of his type "S" post at this time or before?

A. Yes, sir. I had seen a photograph. He had sent me a photograph some time prior to this.

Q. Did he make any claim to you at any time that he intended to apply for a patent upon his type "S" post?

A. He did not.

Q. Or that this post was similar to his type "S" post?

A. He did not claim that the post was similar to it, and, as I remember it, there was some discussion affecting that matter, as to the matter of professional ethics. I spoke to him regarding the design of his post and the design of mine, and practically spoke of not wishing to even infringe on any design of his, and there was no suggestion of any infringement of any character whatever at that time, and I felt satisfied that it was all conceded that there was no similarity

of design.

Q. Was there any claim by Mr. Grelle at any time that there was any similarity between the two posts?

A. There was not.

Q. Could you have prepared the details and plans of your post from the photograph of the type "S" post?

A. Why, no, I could not have made drawings, except that new patterns would have been required throughout. I could not have made drawings from the photograph of that post. I could have made drawings, but the patterns would not have been identical with those of the post.

COURT: With the photograph before you giving you the idea of its construction, could you have made drawings and a pattern which would have been similar to that?

A. Been very similar, yes, indeed.

Q. Mr. Meyers, I hand you a design of post here, marked "Pendant Egyptian Standard," and ask you to state whether or not you to some extent in designing your post followed the design of this post?

A. Why, I followed the design of this post very largely. This post is what started me on the design, and which was followed in the main throughout.

Mr. SKIPWORTH: The defendant City of Eugene at this time offers in evidence the cut of a post known as "Pendant Egyptian Standard," introduced for the purpose of comparison.

Marked "Defendants' Exhibit 3."

Q. Where did you get the design of that post, Mr.

Meyers?

A. In answer to the correspondence with the various manufacturers of posts. That design, that particular one, comes from Minneapolis.

Q. And is it patented, do you know?

A. It is not marked "Patented." It is my general presumption that it is not patented.

Q. Is it advertised in any pamphlets or catalogues?

A. It is.

Q. In the catalogue of the Flour City Ornamental Iron Works?

A. I had a number of catalogues and cuts of other posts in my possession at the time I designed the city's post. I think the principal one that I used in addition to this was the one known as the "Cutter's Boulevard Post."

"Defendants' Exhibit 1," "Cutter's Boulevard Post." I had a cut of that post in my possession at the time I designed the city's post.

A. It seems to me I got that about in the early part of that work. I don't know just what time—perhaps the latter part of October, 1911.

Q. Was the Plaintiff's type "S" post submitted to the Water Board—cut of the photograph of the plaintiff's post, type "S," submitted to the Water Board?

A. Yes.

Q. And did some of the Water Board like that type of post?

A. Some did. The majority, however, didn't like it so well, and gave me orders to go ahead with the

design of a post.

Q. Did you design this post under the instruction of the Water Board?

A. I did.

Q. What was the object in asking the plaintiffs to offer quotations on their light-post, or did you make any such request?

A. I believe there was such a request, yes. There were several of the Water Board who liked this type of post, were rather anxious to get quotations on that post.

Q. Did you submit plans and specifications of your post, or the city's post, to each of the four bidders?

A. I did.

Q. And you never had any plans or specifications of the type "S" post?

A. No, sir.

Q. Merely the photograph?

A. The photograph.

Q. Would the photograph have been sufficient for bidders to bid on?

A. Why, no, it would have been unsatisfactory.

Q. Well, could they have determined the cost of making such a post without the detail?

A. No, they couldn't have done so.

Q. Did the plaintiffs ever offer you the plans and specifications of their post?

A. No, sir.

Q. Do you know when Gross Bros. commenced the manufacture of the city's post under their contract?

A. Why, they commenced a few days before the contract was actually signed.

Q. After it was let, but before it was signed?

A. Yes.

Q. Do you know what preparations they made in getting their plant ready to manufacture these posts?

A. Why, they made considerable preparation, in the manufacture of core-boxes, cores, and their entire molding equipment—the patterns had to be gotten out for the work.

Q. How many posts were manufactured prior to January 11, 1912?

A. Why, there was one complete post inspected by the Water Board and myself on January 5th. The post was completed—I received notification that the post was completed January 4th. At that time, I think, if I remember correctly, there were some twenty odd columns and bases in Mr. Gross' foundry that were practically completed. The posts, I believe, were complete at that time, excepting the globe-holders, which had been held up for some time to get the exact dimensions of the glass globes.

Q. Were the arms completed?

A. The arms and base of the post, columns and bases, were completed at that time.

Q. What do you mean by the globe-holders?

A. Those cup-shaped parts that support the globe alone.

Q. Does the post designed by you differ from the type "S" post of the plaintiff, and if so, in what particular?

A. Why, the post designed by me, I consider is an entirely different post—built on entirely different lines. There are no two lines of this post exactly identical with the lines of the post designed by Mr. Grelle. The entire form of the post leans to square. The base of the post is square. There are square inset panels.

Q. Square what?

A. Inlet panels. The column, of course, is on the round. However, the fluting, I do not think that it corresponds at all to the design by Mr. Grelle; that is, the flutings in size and shape are entirely different.

Q. You mean the fluting on the city posts?

A. On the column, yes.

Q. The fluting on the column of the city post and the type "S" post is different?

A. Yes.

Q. How is it different? In what way?

A. On account of the size of the flutes of the panels, and the number and markings around the post. The head of the post is essentially square in all sections. The arms are square. Whereas the head of the post of the type "S" post is round, and the arms are round or elliptical in section. They are fluted, while the arms of the city's post are paneled, presenting entirely the squared effect.

Q. Now, what would be the effect upon the eye—the eye of a mechanical observer?

A. The posts would, in my opinion, look entirely different.

Q. Why?

A. Because of these differences of designs, be-

cause these lines do not follow, and do not cause the posts to resemble one another.

Q. And what would be the effect upon the eye for a distance, say, across the street?

A. One can easily see that the post is square.

Q. If the two posts were side by side across the street, what would be the effect on a casual observer?

A. Any one could easily see that one post was round and the other was square.

Q. If the posts were side by side, and lighted, after night, then what would be the effect?

A. Well, if the posts were lighted after night, and you were not able to see the posts, especially as they are painted black, why, you could have a great variety of posts that would look alike. In fact, you might have the same effect produced without any post at all.

Q. Explain what you mean by that—have the same effect produced without any posts. Have you any way of illustrating it?

A. I have brought a model to the court-room with which I believe I can explain.

Q. Yes, if you will kindly explain. Will the court permit the witness to stand over there and explain?

COURT: Very well.

A. This model is built entirely of pipe, with the same cups or globe-holders, and is built to exactly the same dimensions as the post-head proper. The post might support these lights in exactly the same position by having this pipe run from a cement base in the ground, and I would hardly consider it a post at all. If it were considered a post, it would be called a pipe

post. And at night it would be very difficult to discern any difference between this post and that one. In fact, this one might be as well turned upside down, in which case the globes at the same position would represent the same figure exactly.

COURT: I don't understand your position on that, Mr. Meyers.

A. I mean that the lights would be supported in the same position, and that after night one could not tell the difference.

COURT: Well, wouldn't you see the arms after night?

A. No, not to any great extent. After night in the distance one does not see the post itself proper; and that is conspicuous in all night photographs of ornamental post systems. It is very difficult to discern, with a night photograph, what the post is like in any respect. One can only see the relative position of the glass globes. At night this post would look very much like that one, or if taken in the very dim distance, where you cannot reasonably see the post, or with a dark background for the post, in which case the post is obliterated, this post would look like the other. That is, all posts with the lamps in approximately the same condition and same relative position—it need only be approximate—would look very much alike when one cannot clearly see the post. In fact, these lamps are still in the same relative position on this model as they are on the head of the post, and yet the general features of the supports are entirely different.

Q. State as to the actual distance between those globes, the position they are from center to center.

A. The actual distance between these globes, between the centers, is 28 inches from each one; and the actual distance between the centers here is made the same—28 inches.

COURT: Well, you wouldn't say that there is any similarity between those two posts?

A. The posts would not really be visible at all. The similarity would consist largely on account of the lights and the globes.

COURT: The contest here is over a similarity of the posts, and not particularly of the lights.

Mr. SKIPWORTH: That is true. There is no question about that.

Q. Now, Mr. Meyers, do you know how long fluted columns have been in use?

COURT: I suppose that is a matter of common knowledge.

Mr. Doyle said 2000 years. I have an idea it is twice that, or more.

Q. Is there anything new or novel or ingenious in the design of either the city's post or the plaintiff's type "S" post?

A. I do not consider that there is anything new or novel.

Q. Isn't it a fact that there is great similarity between all street lighting posts?

A. Well, all posts have certain things in common, in order to enable us to name them posts, I presume.

Q. Well, what have they in common?

A. Well, commonly they have a base and a shaft, and they have some point to support the lamps.

Q. Have you yourself observed a general similarity between street lighting posts?

A. Yes, I have.

Q. To any extent?

A. Yes, to a considerable extent.

Q. Does the post designed by you differ from the plaintiff's type "S" as much as other posts differ from it—other posts in evidence?

A. Yes, I think so. I presume they do.

Q. How about the Cutter's post—Cutter's Boulevard Post—represented by Defendant's Exhibit 1?

A. Well, I am of the opinion this post is more similar to the type "S" post than the city's design.

Q. Why?

A. Because of the fact that the entire post is designed with round parts, and tends much more to ornamentation. The head of it is designed with round and elliptical shaped arms. The cups that hold the globes are ornamented. The post is generally ornamented to a greater extent.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Meyers, in your direct testimony you said that the conversation between yourself and Mr. Grelle all conceded that there was no similarity, this remark being made when you had your plans and specifications there, I believe. What do you mean by that? Who was there? Who conceded?

A. Mr. Grelle raised no objection, or said nothing

to the contrary whatever; and I did mention those conditions.

Q. Mention what conditions?

A. The fact that my post was not similar to his, and that I had gone to an enormous expense on the part of the city to re-design a post, and that I would not take any post similar to his post, and offer that in competition with his post.

Q. Now, prior to that time, you had seen the drawings of Mr. Grelle's post, had you not?

A. I had seen a sketch in Mr. Grelle's office, yes, sir.

Q. Well, that sketch suggested, in all its outline at least, the type of post which is spoken of here as "S", being the patented post of plaintiff?

A. Why, I believe, as I remember that sketch, that the type "S" post resulted from that sketch in Mr. Grelle's office.

Q. Yes. And the fact is that that sketch did suggest all the motives and things that enter into the sketch, did it not? I mean, the designing of the post—that sketch which you saw at that time?

A. Well, I don't know that it suggested all of the things that entered into the design or not.

Q. Its general outline?

A. But it suggested generally the post as finally designed by Mr. Grelle.

Q. You listened to testimony here by Mr. Hensill and also by Mr. Doyle. Do you differ with them with regard to the outlines of the two posts, disregarding ornamentation and details, exterior details, being the

same; that is to say, when comparing the plaintiff's post and the defendants' post as shown on the drawing here before you?

A. I don't consider that this is a fair outline of either post.

Q. Well, assuming that to be a fair outline, do you agree with them, or differ, that, admitting that the plaintiff's sketch was the prior in point of time, in that case it was directly suggestive of the defendant's outline?

A. I don't think so.

Q. You disagree with their testimony, then? Is that right?

Mr. SKIPWORTH: I object to the form of the question, your Honor. I think the witness should be asked questions.

COURT: I think he can answer that question.

Mr. SKIPWORTH: Exception.

COURT: It is a short way of getting at it.

A. I didn't understand that.

(Question read.)

A. I would certainly say that that was not suggestive.

Q. You would say that the left hand portion of plaintiffs' exhibit "Y" is not suggestive of the right hand portion?

A. No, sir.

Q. You know what the classic arm or console is, do you not?

A. I don't know as I am familiar with that particular term.

Q. Well, you know a figure which embodies a central portion, with scrolls at both ends, somewhat similar to that shown on the top portion of Plaintiff's Exhibit "DD"?

A. Yes.

Q. Do you recognize the right hand upper portion there as being a console?

A. I don't know as I can use that term just exactly. I don't know what you mean by that term.

Q. What do you call it?

A. I recognize it as a particular figure that is used very, very frequently.

Q. Isn't it of the classic type?

A. I don't know that it is of the classic type.

Q. Not familiar with it?

A. Not familiar with it, no, not with that.

Q. Assuming this upper right hand portion of Plaintiffs' Exhibit "DD" to be of the classic type, do you not concede that the portion shown on the left hand upper portion of the sheet marked "Plaintiffs' Exhibit DD," is suggested by that on the right hand portion?

A. Why, I think that either might suggest the other.

Q. Now, is it not a fact that the arms shown here in the upper portion of "Plaintiffs' Exhibit DD," are directly suggestive of the arms shown here in "Defendants' Exhibit 1?"

A. They are very similar to the arm shown, yes.

Q. In your conversations with Mr. Grelle, did you ask him whether his design or his drawings were pat-

ented?

A. I did not.

Q. Or were going to be patented?

A. I did not.

Q. You knew that he claimed that they were original with him?

A. I don't know whether I was aware of that fact or not.

Q. At all events, that is the first time you had ever had them called to your attention by him?

A. Yes, sir.

Q. Did you make any effort to find out whether the design that you made infringed upon any other design or any other patent?

A. Yes, to this extent: That I was careful to notice in each catalogue which I used in developing the design whether or not the post was marked "Patented."

Q. The fact is, you were trying to get up a design which was free from patents, in adopting something for the manufacture of the City of Eugene lamp-posts?

A. Well, I wasn't trying to follow any patented device, I am sure.

Q. Well, you were trying to keep away from it?

A. I would in general, yes.

Q. Well, then, am I to understand that, since you believed the plaintiff's was an original design, something that was neither patented nor known before, you kept as close to that as you could?

A. I don't think I kept as close to that as I could,

by any means. I kept as far away from that, as I before stated, that I would feel positive that no one could accuse me of having taken his design. That was merely an individual motive—not any requirement, as far as I knew of.

Q. You are not familiar with designs as applied to patent law at all, are you?

A. You mean design drawings?

Q. No, the term "Design" as used in the patent law?

A. I am not familiar with the legal conception of it.

Q. Never took out a "Design" patent?

A. No, sir.

Q. Did you ever make any request for details of Mr. Grelle's type "S" post?

A. Not that I remember, affecting his post.

Q. Well, you don't deny that you could have gotten the details if you had asked for them?

A. That I do not know.

Q. The contract, it appears, between the city of Eugene and Gross Bros. was dated December 16, 1911. How soon before that were the bids opened, after Mr. Grelle and other competitors had put in their bids?

A. I think it was on December 12, 1911.

Q. How much work was done by Gross Bros. on the contract which was to be awarded to them, between December 12th and December 16th?

A. Why, I don't know how much work was done; but I passed there several times during that time, and I know they had hired several extra men, and were

cleaning up their foundry and preparing forms for molding and molding boxes.

Q. Well, I would like to find out fully from you, if you know, as to what the condition of the work was on January 4, 1912, with regard to work being done under the contract referred to.

A. Yes, in a general way, there was, as I remember it. I think I counted twenty columns and bases and most of the arms finished at that time, awaiting the globe-holders. One post was finished complete, and was set up in place for acceptance, at that time.

Q. It appears in the contract here that you had a right to demand changes after the first post was inspected. I would like you to tell me whether you waived that right.

A. I never waived the right. The post was inspected, and the men were told to go ahead.

Q. Well, then, are we to understand that all this material that Gross Bros. made up ahead of the inspection, they took a chance on that all being right?

A. To a certain extent, yes. But it was convenient for me to see the work in progress at Gross Bros.' foundry repeatedly, and as the work was going on I assured them that I would be satisfied with certain portions of it.

Q. Did Gross Bros. make any demand for money prior to the March 1st estimate?

A. I don't know that they did. The demand would not have come to me.

Q. Can you explain—there appears to me to be an element of discrepancy here—if on January 4th the

Gross Bros. had substantially twenty posts complete—why they received a payment for a smaller quantity on February 1st estimate, or March 1st? In other words, when they got their first payment, why not all the work that they had done was included?

A. I cannot say, because in my capacity as superintendent I was away from Eugene a good share of the months of February, March, and some in April—the entire month of April.

Q. Do you know why it was that Gross Bros. received no payment on February 1st, when they had all this work done by January 4th—these twenty posts practically complete?

A. I do not. I would like to say in that respect, that I do not know that they had the arms entirely completed at that time for those twenty posts; but I feel sure that they had the bases and columns completed at that time. Those I know of—passed upon.

Q. Mr. Meyers, when you made that design for the lamp-posts, made your own design for the lamp-posts, that is, these drawings and specifications, is it not a fact that you had Mr. Grelle's photograph, or cut, or whatever it may have been, right alongside of you?

A. I had Mr. Grelle's photograph among the other views and cuts that I had.

Q. You took a great liking, did you not, to that design of Mr. Grelle's, in its general outlines?

A. Why, I don't know as I took any special great liking to it. I believe I rather liked the post the first time I saw it, but only to that extent that I have—

Q. Well, do you consider that the design which you got up, from an artistic standpoint, is superior to that which Mr. Grelle got up?

A. Well, I did not consider it so in a way, and yet in another way, no. The design that I got up I made a special effort outside of the artistic standpoint—I suppose perhaps in some people's eyes I destroyed the artistic appearance of the post by trying to make the post exceedingly plain, so it would not catch dust as practically or nearly to the extent that all the other posts would, with their extreme ornamentation. Leaving that off, I considered that I had a post that would present a much better appearance during the dusty summer.

Q. Well, isn't it a fact, when we take a square surface and knock off some of the corners, we get it towards the round?

A. I suppose that is true.

Q. Well, when you knock off the corners, you have less surface, have you not?

A. I suppose you do; but if you leave the corners very rough and jagged, you will have lost the whole thing you are trying to gain.

Q. Well, of course, that part would be merely a part of finishing and detail in finish?

A. Yes.

Q. But you will agree with me that a round surface has less area exposed to the collection of dust than any square surface, has it not?

A. Yes, providing it is round and smooth.

Q. Well, you can make any surface smooth, can't

you, if you try?

A. Well, yes.

Q. Now, isn't it about—summing up the whole matter truthfully, the way Mr. Geller put it, that there was a leaning towards having the work held there in the City of Eugene, and for that reason you gave the contract to Gross Bros. at so much—by the Water Board?

A. Yes.

Q. And isn't it also true that, while you had made no inquiries from Mr. Grelle whether he was going to patent his design or not, you took a chance on that, but you adopted that design because you liked it, and because you thought it was different from other designs which had been brought to your attention?

A. Well, I did not in any respect adopt Mr. Grelle's design, but I did attempt to design an entirely different post, which would be a post that was individual for Eugene, and that consideration was also taken into account by the Water Board, that they rather preferred a post which would not be found at large throughout the country.

Q. Well, but the fact is that you were influenced to a large extent by the sketch, drawing, photograph that you had seen of Mr. Grelle's post in making up your own design?

A. Why, at first, as I said before, I rather approved of Mr. Grelle's design, but as I went further on I did not approve of Mr. Grelle's design, and went to the other extreme, and took other cuts entirely from which my work was developed.

Q. Well, you admit that there is no cut here, at least I haven't seen any, that is suggestive of this type of arm here? If you have any to show to the court, I would be glad to see it.

A. I think this is suggestive of that type of arm.

Q. Then you claim that "Defendants' Exhibit 1" is the only one that you have that is suggestive of the plaintiff's type of arm?

A. That is the most nearly like the general type of arm in the plaintiffs' type "S" post.

Q. And you come to that conclusion notwithstanding that there is no scroll work on the plaintiff's type of arm whatsoever?

A. The scroll work is easily omitted there. It is not essential at all.

Q. Then, is it not a fact that the only similarity that you find between the plaintiff's arms of his lamp-post and that of the arm of the post here in Defendant's Exhibit 1, is that portion intermediate the two scroll extremities?

A. Well, I don't know as I can say that that is entirely true. It looks to me from this view as though there was a base at the end of that arm which conformed very largely to that of the plaintiff.

Q. The base at the end of Defendant's Exhibit 1?

A. The part that is molded fast to the rounded head.

Q. What part do you refer to as the base?

A. I refer to this part right here.

Q. Right near the column?

A. Yes.

Q. As shown in Defendant's Exhibit 1. There is a scroll there—scroll type, is it not?

A. It is hard to tell whether that is exactly a scroll or a base for the fastening. It is intended to represent to a certain extent a scroll.

Q. I show you a picture taken from a catalogue, and ask you whether the two posts are not substantially identical; if they are not identical, in fact—the tops of the two posts?

A. Why, they are substantially identical. The two—yes, I believe the two cuts are practically identical.

Q. Now, is it not a fact that the smaller cut here, showing a three-light post, has arms which are identical with those in the five-light post?

A. Yes.

Q. Mr. Meyers, is it not a fact that sometime after March 14th you were told by Gross Brothers, or some one connected with them, they had received a letter advising them that the post which they were manufacturing was an infringement of the plaintiff's post?

A. Why, I don't remember just what time. I know that that was reported to me, that Gross Bros. had received a notification that Mr. Grelle expected to get out a patent.

Q. No, I mean after the patent had been obtained?

A. I don't remember of it.

Mr. SKIPWORTH: Show him the letter.

Q. It was after March 14, 1912.

A. I don't remember that we got any communica-

tion whatever after that time. I may be mistaken.

Q. Do you remember having any conversation with Mr. Svarverud about a letter which the mayor or common council received—

A. Mr. Svarverud turned over all the letters that he received to the secretary of the Water Board, or to myself.

Q. Just read over that letter, and see whether that is not familiar to you as having been received. (Exhibit P.)

A. No, sir, that letter was never received. At least, I have no knowledge, and I should have had knowledge of it if the letter had been received by either Mr. Svarverud, the Secretary of the Water Board, or myself.

Q. And Gross Bros. didn't at any time inform you of the fact that they received a letter of that kind?

A. I believe some considerable time later I found out that Gross Bros. had received a letter of that character.

Q. To this same purport?

A. Yes.

Q. Now, it mentions in here in this letter, among other things, "I beg to call the matter to your attention and ask you forthwith to make the proper arrangements, either with myself or Mr. Grelle, for obtaining a license on fair compensation, permitting you to use his design." Was that portion of the letter ever mentioned or discussed in your meetings of the board?

A. Why, I think it was, to a certain extent. I know the question was raised as to whether we had

gotten such a letter or not, and the answer was negative, that we had not.

Q. Is that all the conversation there was about it?

A. Substantially. That is the essence of it.

Q. Did the question not come up in any of those meetings that it would be a proper thing for you to pay royalties if you were infringing on somebody else's patent?

A. Why, I don't think there was any occasion where anything of that kind came up before the Water Board, that is, the Water Board assembled. There may have been some talk of that character among individuals.

Q. Well, were there questions at any time when it was conceded in conversation between the members of the board that they had been notified that they were infringing a patent which Mr. Grelle claimed on lamp-posts?

A. No, I don't know as there was.

Q. Was the matter referred to in any other shape—this infringement proposition?

A. No, not in the work of the Water Board. These letters, as they came in, were mentioned in the Water Board's meetings.

Q. The management of all this work was turned over to you, was it not—I mean, the Water Board? They had exclusive charge of it for the City of Eugene?

A. Yes.

Q. And then, as I understand you, you admit having received these letters, but you simply ignored

them, and paid no attention to them whatsoever?

A. Well, I think there were several remarks passed that they didn't see any reason why they should pay any attention to them.

Q. And that was all that was done about it?

A. That was substantially all that was done about it. There was no action taken by the board as a whole, nor no action taken in the board's meetings.

Q. Mr. Meyers, is it not a fact that you had a conversation about this suit shortly after it was commenced, with a Mr. Wernicke, at his office in the City of Portland?

A. Worthington? I would not be sure. I don't remember the name.

Q. Wernicke is the name.

A. I don't remember the name definitely, to be sure I did or not.

Q. The local representative of the Westinghouse Company, at his office in the City of Portland?

A. I don't know of any one of that name that is a representative of the Westinghouse Company.

Q. His name is Carl L. Wernicke.

A. I beg your pardon. I understood you Worthington. Yes, I spoke to Mr. Wernicke. I don't remember that I spoke anything about this.

Mr. SKIPWORTH: Your Honor, I think he is entitled to time, place and persons present, and all the conversation.

Mr. GEISLER: I am trying to give him that. I want to give him all that. I want to find out first whether he had such a conversation.

Q. It was shortly after the suit had been commenced—now, I will tell you when that was. This suit was commenced—I have a receipt here showing the payment of the clerk's fees December 20, 1912. Sometime after that, at Mr. Wernicke's office in the City of Portland, did you have a conversation with him about this suit?

A. I had a conversation, and the suit was incidentally mentioned.

Q. Now, did you not at that time say to Mr. Wernicke that you would like him to induce Mr. Grelle to discontinue his suit, because it would reflect upon your ethical standing with the Water Board, something to that effect?

A. I didn't say anything to that effect, no, sir.

Q. What did you say about this suit?

A. As I remember it, I did speak to him, and I may have asked him if he could in any way induce Mr. Grelle to drop that suit; that I considered that he was entirely in the wrong, that he knew he was in the wrong, and that he certainly knew that he was infringing on the engineering code of ethics in bringing such suit.

Q. The main differences that you have been speaking about here as in your mind, changing the defendants' lamp-post from that of the plaintiffs' patented lamp-post, is with reference to the details, the panel work and cross-section?

A. The entire appearance of the post as it appears to the casual observer.

Q. Yes, but your main references are to these de-

tails, are they not?

A. Why, the details are largely effective in making up my conclusion, yes, sir.

Redirect Examination.

Q. Will you explain why the Water Board let the contract to Gros Bros. in preference to the plaintiffs in this case, the plaintiffs being a lower bidder?

A. Well, the consideration was largely being able to manufacture them at home, giving the home merchant the chance, and the difference in price, somewhere approximately \$100 in the entire equipment, was considered sufficiently offset in being able to inspect the posts at home and see that they were made according to the specifications, that they were made good, without flaws, and would be satisfactory to the Water Board.

Q. Was the work inspected from time to time?

A. Yes.

Q. By you?

A. Yes.

Q. And by inspection at home, and having the work done at home, the expense of running back and forth between Eugene and Portland was necessarily saved? Is that correct?

A. Well, not only the expense, but the satisfaction of knowing that the work was done in the very best kind of manner.

Examination by the Court.

Q. Mr. Meyers, what position do you occupy in the Water Board?

A. As general superintendent for the Electric and Water Board.

Q. Did the Board employ you to get up this design?

A. They did. They instructed me to go ahead with this.

Q. You said the design was gotten up with great expense? What expense attended the getting up of it?

A. The design?

Q. Yes.

A. The work of a man in the office for a considerable length of time, the making of drawings, and a great deal of my time was spent in looking up different schemes of design for posts—a good deal of my time—and then I went out and sent a young man out at different times. A young man made a trip to Ashland purposely to look into the question of concrete posts.

Q. The Board paid you? I mean, you were paid by salary, were you?

A. By regular salary, yes.

Q. You didn't get anything extra?

A. Nothing extra, no, sir.

Q. Did you say that when you were drawing this design it was your purpose to keep away from the Grelle design as much as you could, so as not to infringe it?

A. Well, I wouldn't say it was my purpose. I would say that I did, to my own satisfaction, finally get far away from it.

Q. Well, you had the Grelle design before you at the time?

A. I had the Grelle design, as far as the photograph would give me the general appearance.

Q. It was a purpose in your mind, was it, or was it not, to keep away from the Grelle design?

A. It was a purpose in my mind not to adopt another engineer's design directly.

Q. Well, did you have the Grelle design in view?

A. No, not to adopt it in any wise.

Q. I mean, did you have the Grelle design in your mind, and at the same time, having that in your mind, it was your purpose to keep away from that design?

A. Yes, sir, to the extent that I should not wish to adopt another's design—

Q. So that you would not pattern after that design?

A. Without special request from them.

Q. Well, now, I understand that you had that design, along with the other designs that you got from these catalogues?

A. Yes.

Q. And that you drew your plans and specifications, and drew your model, from the ideas that you got from those several designs?

A. From the several designs. To what extent I may have been influenced by this particular design, I couldn't say. I had it before me, but I did not wish to follow any of the lines that were presented in that design.

Q. Were you aware that any of the designs, or

was it a fact that any of those patterns or designs were at that time patented?

A. They were not patented, as I took it, when they were not marked "Patented" on the catalogue. Practically all catalogues showing any design patented are marked "Patented."

Redirect Examination Continued.

Q. Did you have any correspondence from manufacturers of posts to the effect that their posts were not patented?

A. Yes, I did.

Q. And did you have some of the cuts of those posts before you at the time?

A. Yes.

Q. And whom did you get the letter from?

A. Why, I got one catalogue from St. Louis, representing a post that was identically like another post that was patented. I also got letters from the George Cutter Company.

Q. Examine these letters and see—

A. I received these letters.

Q. Did you get a letter from the George Cutter Company in reference to their post—their "Cutter's Boulevard Post"?

A. Yes.

Q. And you had their cut in your possession at the time?

A. Yes, sir.

Mr. SKIPWORTH: I would like to introduce this letter from the George Cutter Company in evidence.

Mr. GEISLER: I object to that. It is immaterial

and irrelevant. It seems to express an opinion of a man on an expert question on which there is no qualification, nothing here to show.

Mr. PIPES: It shows the good faith of Meyers. It will cut some figure in this.

COURT: I think it is enough on that subject that he has correspondence with different parties, and that is drawn out.

Mr. GEISLER: For that purpose, I will admit it.

Mr. SKIPWORTH: Can we show in the correspondence that they gave him the information that their posts were not patented?

Mr. GEISLER: That is all right. I don't object to that.

Mr. SKIPWORTH: We don't care in detail.

COURT: You can take that for what it is worth. It will be sufficient that he swears that the correspondence gave him that information.

Mr. PIPES: Yes, that is all right, your Honor. That is a fact, is it, Mr. Meyers, that the correspondence gave you the information that these different cuts were not patented?

A. That they were not patented, and that they did not consider the patent was worth anything.

Mr. GEISLER: I move to strike that out.

COURT: I think that latter ought to go out.

Excused.

Mr. SKIPWORTH: It seeme to me we would be entitled to an order of the court to have the plaintiff produce his head in court.

Mr. GEISLER: You don't need an order.

COURT: You will get it here, if you can?

Mr. GEISLER: Oh, surely, your Honor.

Mr. GRELLE: I don't know whether we can get that head here or not, because only a short time ago we sent out two sample posts, and I don't know but what the head we had at that time was in.

COURT: Have you a model?

Mr. GRELLE: Yes.

COURT: What is the reason that wouldn't suit as well as the heads themselves?

Mr. GRELLE: I would like to bring down exactly what the defendant has brought here. If I can do that, I will be glad to.

COURT: Well, you may do that.

Adjourned until 10 a. m.

Portland, Oregon, May 27, 1913. 10 a. m.

ROBERT E. GROSS, called as a witness on behalf of defendants, being first duly sworn, testified as follows:

Direct Examination

Questions by Mr. SKIPWORTH:

I am a member of the firm of Gross Bros. Iron Works, of Eugene, composed of myself and two brothers, W. J. and F. L. We are a partnership doing business under the firm name and style of Gross Bros Iron Works. Our firm does business in Eugene, Oregon. Our iron works are in Eugene. We are the Gross Bros. to whom was let the contract for the manufacture of a post designed by the City of Eugene. That contract was signed about the 16th of December, 1911,

between the 16th day of December, 1911, and the first day of January, 1912. About the first thing we did was to make the patterns and core-boxes and flask to mold the parts in. We were at a large expense for that sized order, approximately \$500 or \$600. We had not manufactured any posts prior to these posts for the city. We commenced the actual work of manufacturing immediately after we signed up the contract. By January 11, 1912, we had several of the different parts cast but I don't know as we had very many, if any, except one, perhaps, assembled together—all together.

Q. Well, How many parts had you manufactured by January 11, 1912?

A. Well, I would say about parts for about 15 to 25 posts, but the posts were not completed or the parts assembled. We did not know at the time you took this contract the plaintiffs claimed any patent upon their type "S" post. I was not acquainted with Mr. Grelle at that time. I had no communication from the plaintiffs in reference to an infringement on their post at that time. "Plaintiffs' Exhibit M," which is a letter from the plaintiffs directed to our firm—Gross Bros. Iron Works—dated January 11, 1912, is the first notice I had that the plaintiffs had applied for a patent upon their type "S" post. "Plaintiffs' Exhibit O," which is a letter from the plaintiffs directed to our firm, dated March 6, 1912, was the second notice we received from the plaintiffs in reference to this matter. "Plaintiffs' Exhibit Q," which is a letter from Mr. Geisler, attorney for plaintiffs in this case, directed to our firm, dated March 14, 1912, was also

received by us. At the time I received this letter, about forty or fifty posts were completed. The contract was for 92 of five-light posts.

Q. You may state to the court, now, what extra expense, besides fitting up your works for manufacturing these posts, you had entailed.

A. We were compelled to hire extra men. Went to some extra expense. We made no profit on the contract. We are not in the business of manufacturing posts and do not intend to manufacture any more.

Q. I wil ask you to state if you would have proceeded to manufacture these posts if you had known plaintiff had applied, or had a patent for his type "S" post, or claimed that this post was an infringement?

A. Certainly not.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Gross, you say that immediately after the contract was signed, you started to manufacture lamp-posts under the contract?

A. Yes, sir.

Q. What do you mean by the word "immediately" there?

A. Well, sir we went right to work to get patterns, as quick as the contract was signed.

Q. Had you any of the patterns started, or finished, partially finished, prior to the date of the signing of the contract?

A. Yes, sir.

Q. How long before that time?

A. We started to make some patterns when we first received the plans.

Q. When was that?

A. I couldn't give you the exact date.

Q. Well, approximately?

A. I think about the 1st of December, 1911, along about the first part.

Q. It was at that time you had first received the plans, and you immediately started to make up your patterns?

A. Yes, sir.

Q. Those patterns you could not have used for any other purpose than for the construction of these particular lamp-posts?

A. No, sir.

Q. Had you at that time, then, received an assurance from some one whom you supposed to be in authority, that you were going to get this contract?

A. No, sir.

Q. Well, how could you go to the expense of making your patterns when you hadn't any idea as to whether you were going to get the contract or not?

A. From the fact that this was new business to us, this lamp-post business, and we thought we could start the patterns and see what there was to do, and what we had to do in case we was awarded the contract, and it would help us to base our figure for the job, as we had two patternmakers, my brother and my father, and plenty of pattern lumber, so that the expense—we didn't care what it cost us to make a start on them.

Q. What other work did you finish prior to the awarding of the contract, with regard to this particular work?

A. Nothing.

Q. You only did the patterns?

A. That is all.

Q. When you received that letter from me, bearing date March 14, 1912, being "Plaintiffs' Exhibit Q," informing you that the patent had been duly issued—would be issued on the 12th of March, 1912, and that your post was an infringement, did you call that letter to the attention of the Water Board?

A. Yes, sir.

Q. Name the particular person or persons to whose attention you called that letter.

A. Well, I think I called it to the attention of some of the members of the Board; also to Mr. Meyers, I believe. I am not so sure whether he was there at that time—but some of the officers of the company. I disremember now just whom I informed of the letter.

Q. Do you remember whether you notified Mr. Geller?

A. Yes, I think I did.

Q. You did?

A. Yes, sir.

Q. When you received this letter from Mr. Grelle, the plaintiff, dated March 6, 1912, and being "Plff's Exhibit O,"—did you notify the Water Board of the City of Eugene officials?

A. Yes, sir.

Q. Did you take any pains to verify the statements contained in those letters, as to whether there was a patent to be issued on these posts or not, after you received that notification? Did you make any effort to find out whether there was a patent issued or to be issued on this post after you received the notification?

A. No, sir.

Q. Did you make any overtures to the plaintiffs here for permission to manufacture under their patent?

A. No, sir.

Q. To pay them a royalty or any thing of the kind?

A. No, sir.

Q. I understood you to say that you would not have proceeded with the manufacture of these posts, if you had known that the post was patented. Did you make such a statement?

A. Yes, I think I did.

Q. Why, then, was it, after you were advised that the post was patented, you continued with the work notwithstanding?

A. Well, I was advised to go right on with my contract.

Q. Who so advised you?

A. The Water Board?

Q. Why was it that, after having received the notice of the issuing of the patent on this design to plaintiff—I refer to the letter written by me to your firm under date of March 14, 1912, at which time you

stated you had only about 40 or 50 posts completed—I wish you would state fully why it was that you went on completing the remainder of the order of the 92 posts, ignoring such notification.

A. I was told to go ahead by the Water Board.

Q. That you took as your exclusive guarantee for proceeding with the order in defiance of the notification or the patent?

A. How is that?

Q. I say, the instructions received from the Water Board you took as your warrant to be sufficient to ignore the notification or the patent?

A. Certainly.

Q. When did you complete the remainder of the 92 posts?

A. I think about the middle of May, 1912.

Q. When did you finally deliver the posts that you had completed about the middle of May, 1912?

A. About the last of May.

Q. Now, what am I to understand by a complete delivery?

A. Well, when the contract was completed, the posts were done, and they were accepted.

Q. You say you had them finished and accepted, but as a matter of fact, they were still in your hands, were they not?

A. They were contained in a building adjoining our property, an old building, belonging to the McClure estate.

Q. As a matter of fact, you were using that shed, weren't you?

A. Well, we could have used it if we had wanted to, but I say we just only had some wood in it.

Q. That was your wood?

A. Yes.

Q. And you put those posts in there as fast as you completed them?

A. They did. They put them in—not us. They accepted those posts at our plant, on our property.

Q. Didn't your own men, after they were finished, take them from your shop and put them into the shed?

A. No, sir.

Q. Who put them in there?

A. The men that worked for the Eugene Water Board.

Q. Now, when did they put them in that building?

A. When they were received by the engineer.

Q. When was that?

A. At different times as the work progressed. I can't call just the exact time that the deliveries were made.

Q. The City of Eugene had nothing to do with this shed whatsoever, had they? They were not using that shed?

A. No; no.

Q. It was really under your control, that shed, wasn't it?

A. Well, yes, you might say it was.

COURT: How is that matter material to the inquiry?

Mr. GEISLER: Just this, your Honor. There is

a question of delivery. I want to fix the delivery. Delivery is not made until there is a complete delivery—it is a sale at that time. I contend that simply taking the posts from one portion of the shop and putting them in another portion of the shop, with notification of the defendant city that they could come and help themselves whenever they wanted, is not a delivery.

COURT: Gross Bros. are sued here for an infringement of the patent.

Mr. GEISLER: Yes, your Honor. I am fixing that they did make an actual sale after the patent issued, or at least completed the sale after that.

COURT: Very well.

Q. When did you receive your final payment on the contract for the posts?

A. About the 14th of June, 1912.

Redirect Examination.

Q. Now, Mr. Gross, when you received these letters that are in evidence here, directed to your firm, didn't you consult me in reference to the matters contained in those letters?

A. Yes.

Q. Didn't I advise you—

Mr. GEISLER: That is rather leading, it seems to me.

Mr. SKIPWORTH: Well, it is redirect examination.

Mr. GEISLER: All right.

Q. Didn't I advise you, in my opinion that the city's post was not an infringement of the plaintiff's

patent?

A. Yes.

Q. You consulted Mr. L. Bilyeu with reference to that matter, too?

A. Yes, sir.

Q. Didn't he give you the same advice?

A. Yes, sir.

Q. Is Mr. Bilyeu an attorney-at-law in Eugene?

A. Yes.

Q. Now, did you have any control over this shed that the light posts were stored in? Was it any part of your shop?

A. Well, I will tell you—we used to have our shop there when we first started in business; we had the property rented. But finally we bought our property, and moved away from that building altogether. We had nothing in there except some wood in an old shed, as the buildings are no good for anything other than that, and this property, as I say, belongs to the McClure Estate, and the McClure boys live in Seattle.

Q. And it was no part of your shop?

A. No part whatever.

Q. Do I understand from your testimony the Water Board received these posts from time to time as they were manufactured?

A. Yes, sir.

Q. Wasn't the last delivery made on the 10th of May, 1912?

A. Well—

Q. Or do you remember as to that?

A. Yes, it was about that time.

Q. Seventeen posts delivered on the 10th of May, 1912. Wasn't that the last delivery, or do you remember as to that?

A. Well, I can tell you by the requests that I have from the Water Board.

Q. Have you any memorandum? Refer to it and refresh your memory.

A. Yes. Well, I have the requisition right here that will show what you want.

COURT: Just give the date.

A. Yes, that is what I want to do. I couldn't see, the way they were pinned in here. The first—

COURT: The last delivery.

Q. The last delivery?

A. 5/10/12.

Q. How many posts? Have you a record there of the number?

A. Yes. 17 five-light posts and 14 one-light posts.

Mr. GEISLER: When was that?

Mr. SKIPWORTH: The 10th of May, 1912.

WADE H. PIPES, called as a witness on behalf of defendants, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. PIPES:

I am an architect. I reside in Portland, Ore. I have made a special study of designing in London in the Central School of Arts and Crafts, for nearly three years and a half, and in the office of Charles Spooner, a well known London architect and designer, a member of the Royal Institution of British Architects. I

am in active practice now of architecture in Portland.

Q. Will you examine the type "S" post, which I now hand you, and the city's post, and state in what they differ, from a designer's point of view, commencing at the base?

A. Well, they differ in nearly every respect. The feeling of the design is altogether different. This post is a much—

Q. That is, the city's post?

A. The city's post is a much coarser motive altogether. This is more refined. The moldings are more refined.

Q. That is, the type "S" post is more refined?

A. Yes, more refined. Of course, all of these posts are based on a column. The column has been in use for hundreds of years. But these posts are about as dissimilar as lamp-posts could be. Of course, all cities, both in America and Europe, have agreed pretty much about what a post ought to be in its general form. There is not very much chance for originality in that line at all. The only chance for originality the designer has in designing a post is in the detail.

Q. Well, now, would those posts be likely—would the difference be noted by a casual observer, in those posts, in your opinion?

A. Well, I should think it would.

Q. Have you examined the top of the type "S" post and the city's post here in the court room?

A. Yes.

Q. Would a purchaser be likely to be deceived by the city's post?

A. That would be impossible.

Q. Would you say that one was a copy of the other in any way?

A. I cannot see how it would be.

Q. Is there anything novel or new in either one of these lamp-posts in the parts?

A. No, there is not. Similar designs have been made all over the country.

Q. For how long?

A. Well, the top part of this sort of posts has not been in use a great many years. They have been in use since they used to use the old kind of electric lights, that dropped down on a wire. When those went out of date, these began to come in, and they used to twist them up on the pole—an arc light.

Q. Is there anything novel in the fluted column?

A. Well, the fluted Doric column is as old as Greek civilization nearly. I guess it is as old.

Q. You say all these lamp-posts evolve or develop from the column?

A. Yes. They all have the base.

Q. Have you a picture of any architecture—any column there, that would illustrate what you mean?

A. I have a column here that is about 400 years old.

Q. What building is that?

A. Let me see if the name of it is here. Well, it is an English country house, one of the old ones.

Q. How old is it?

A. It is about 400 years old.

Q. Is this from "Country Life?"

A. Yes.

Q. An English publication?

A. Yes.

Mr. PIPES: I offer this in evidence.

Marked "Defendants' Exhibit 4."

COURT: I suppose it is not claimed that that column is new?

Mr. PIPES: Well, it shows the base, and has a base like the city's post also.

Mr. GEISLER: We don't claim anything for any of those individual parts.

Cross Examination.

Questions by Mr. GEISLER:

Mr. Pipes, you are a brother, I presume, of counsel examining you?

A. Yes.

Q. Now, you are not versed in the patenting of designs for posts?

A. No. No, unfortunately an architect cannot patent his designs, or he doesn't patent them.

Q. And you have never specialized with regard to designing lamp-posts, or anything of that kind?

A. I have not.

COURT: Do you say an architect cannot patent his designs?

A. Well, I am not sure about the law of it; but he never does, as a matter of fact.

Mr. GEISLER: That is a fact.

Q. Now, if I would give you an outline of a lamp-post that I should like to have erected, would it not be possible then for you, without altering the outline

in any shape or form, to make any parts of that lamp-post square, circular, octagonal, elliptical, or other variations from the square, that way in cross-section, and still keep it in the same outline?

A. Yes.

Q. I will ask you to kindly look at the lamp-post on the left-hand portion of the sheet of paper which you are now holding, being a drawing of the plaintiff's lamp-post, an outline of it (the paper being marked "Plaintiffs' Exhibit Y"), and I will ask you to inspect, in connection with that, the right-hand portion of the same sheet, showing an outline of a lamp-post marked "Defendant's post." Now, is it not a fact that the figure shown on the left of that sheet is suggestive, as a whole, and particularly with regard to its upper part, of the figure shown on the right hand portion of that sheet?

A. Yes, it is, but this drawing gives a wholly wrong impression.

Q. Now, wait a minute. I am going to ask you that question. One at a time. What is your answer to that?

A. Yes, the profile is similar.

Q. Now, make any explanation that you want to.

A. Well, I would say that that profile drawing gives a very wrong impression of the dissimilarity of the post.

Q. Well, you have reference to the details that you can put on the outside of the post? For instance, you can put square panels, and you can put any other kind of ornamentation?

A. Of course, this doesn't show any details at all.

Q. But now, disregarding the details entirely—take an outline in form only—and your answer, if I understand correctly, is that the figure shown on the left hand side is suggestive of the right hand side?

A. It is similar, yes.

Q. Well, it is suggestive of it, is it not? It is substantially the same in form?

A. Well, it isn't, no. The general impression is the same, but to any designer, although those moldings seem just very similar there on a small scale drawing like this is, if you draw that the full size, you would see a very great deal more difference than that.

Q. Well, but assuming, or at least taking it for granted, that the figure here on the right hand of this sheet, or defendants' post outline, shows a more abrupt curve, and that the figure on the left hand side, the outline of the plaintiff's post, shows a more graceful curve, in other respects, particularly the upper portion of the two forms, are they not substantially alike? Isn't one suggestive of the other?

A. On the paper there the profiles are similar. I will say that.

Q. Now, would you take the time here and check up the drawings that are in evidence here? I will ask you to do that by and by, check up the blue prints which are in evidence as showing the outline of the design and specifications and so on of the defendants' post, and also that of the plaintiffs' post, and I would ask you to check up with regard to the outline or the form, the general form of the outline, irrespective of

details imposed upon it, or matters such as, for instance, an abrupt curve as distinguishable from a graceful curve—disregarding all those matters—I would like you to take these and check them up carefully, and tell the court of any errors or deviation that we have made, in which either one of the outlines shown on Exhibit “Y” is not a truthful representation of the blue prints furnished. Will you do that?

A. Yes.

Mr. PIPES: When can he do that?

Mr. GEISLER: Any time.

Mr. SKIPWORTH: He cannot do that in five minutes.

Mr. PIPES: You claim that outline is a copy made from the blue prints?

Mr. GEISLER: Yes.

COURT: Do you question that?

Mr. PIPES: Why, no.

COURT: Then there is no need of going into that.

Mr. GEISLER: That is all, then.

Redirect Examination.

Q. Would the fact that the profiles there are similar be any fair test of the similarity of the posts as they appear to the eye?

A. Not at all, because this is an absolutely impossible view of a post. This is a working drawing. You could never see the post as it appears here, because the post is high. You are looking up at it, and you are always looking at it at one angle or another, and the fact that this is square and that round would always be apparent to you. You could not get in position as

you are here. This is assuming that you are looking at every part of the post as you are opposite it, and absolutely square to every part of it and that is an impossible view. It is a view that architects have to make to show the dimensions of things; but it is an impossible view.

Q. But it is a view that the public never see? Isn't that the fact?

A. They could not. It is impossible. They couldn't see it.

Q. Which do you regard of these posts the most artistic, or have you any opinion about it?

A. Well, I regard that one as the most artistic, although I don't think either one of them is anything wonderful at all.

Mr. GEISLER: You meant the plaintiff's, didn't you, when you said "that one?"

A. Yes. That is the most artistic one, yes, sir—the most artistic design.

Excused.

Deposition of G. P. DUNKLIN offered and read in evidence for the defendants.

Mr. SKIPWORTH: I desire at this time to introduce this photograph of our post in evidence. I like it better than the one that is in.

Marked "Defendants' Exhibit 5."

Mr. SKIPWORTH: Also this profile drawing of the post.

Marked "Defendants' Exhibit 6."

Mr. SKIPWORTH: The city rests.

F. C. BAKER, called as a witness on behalf of

plaintiffs, being first duly sworn, testified as follows.

Direct Examination.

Questions by Mr. GEISLER:

What is your age, residence and occupation?

I am a designer of lighting fixtures. In designing fixtures the thought is taken care of first as to the type and the form of the design, and then as to the efficiency of the design. The posts which I have worked out have been for both street and illuminating values, and for decorative purpose.

Q. I show you a paper here with some drawings on it, which is marked "Plaintiffs' Exhibit DD," and would ask you if you have seen that before, and who made those sketches.

A. Yes.

Q. You have seen it before?

A. Yes.

Q. Who made those sketches?

A. I made the sketches.

Q. Would you please look at the figure shown at the right hand upper portion of "Plaintiffs' Exhibit DD," and explain to the court the type of figure there shown?

A. It is what we would term the classic arm.

Q. Now, look at the figure shown in the left hand portion of that sheet, and compare that particular figure with the one in the right hand portion, and state what it is.

A. It is a classic arm slightly modified to take the holder. It is the same type of arm, with the outer curl of the classic left off. It is what we might call a

modified classic arm.

Q. Now, I show you here a cut attached to the deposition of G. P. Dunklin, and ask you to examine the types of arm shown on the lamp-post there illustrated, and compare them with what you have defined on Exhibit "DD" of plaintiffs as the classic arm, and state whether they are similar or dissimilar, explaining fully.

A. Well, the arm on this lamp-post here, No. 2121, is simply a modified classic arm. That is the same base. It is a typical old-style classic arm. The only difference is where the arm passes through the holder, it is modified to make it a little simpler way of fastening the lamp, of fastening the ball; but the base is what we might call the classic arm.

COURT: Do you claim that the arm on your post is a classic arm?

Mr. GEISLER: No, your Honor, to the contrary.

COURT: Then we haven't got any classic arms here in either post?

Mr. GEISLER: No, that is true; and they introduced this, if your Honor will remember, this picture here of the lamp-post attached to this deposition, as anticipating our patent and rendering it void for want of novelty.

COURT: Yes, I understand; and you claim now that this is not an anticipation?

Mr. GEISLER: Yes, your Honor, that is the object of this examination.

Q. Now, comparing the sketches made in the upper portion of Plaintiffs' Exhibit "DD" with the cut

attached to the Dunklin deposition, I would ask you to state whether or not the classic arm, as called by you, would be suggestive of the arm shown in the lamp-post shown in that illustration.

A. You mean to say as to whether or not this arm is—

Q. Is suggestive of the other arm.

A. Yes, the arm on this lamp-post is what we would call the old style, or the old period, classic arm.

Q. Now, I would ask you to look at the lower portion of the drawings there on Plaintiffs' Exhibit "DD" and state whether or not the classic arm is suggestive of the arms there shown.

A. No.

Q. State the reasons for your opinion, and differentiate them.

A. The arm in the two oupper sketches here, one is an old style classic arm, the other is a modification of the old period classic arm, while the sketches below are simply what we might call a structural arm, of a pure modern design. The difference between them, the striking thing, taking it from a period standpoint, is the scroll in the matter of a brace in the old classic arm, which was meant originally to hold something, you see, because it is built up in order to take a shelf on top to support something. This is a mechanical lifting arm, or pure modern mode of structure.

Q. In whose employ are you at the present time, Mr. Baker?

A. J. C. English Company.

Q. What do they specialize in?

A. Lighting fixtures.

Q. How long have you been with them?

A. About three years.

Q. Now, from your viewpoint as an expert in lighting fixtures, I will ask you to state whether or not the arm which is shown in the lower portion of Plaintiffs' Exhibit "DD" is anticipated by anything that is before you now in evidence, or by anything that you know of?

A. No, I could say that it was not.

Q. Now, I would ask you to look at the exhibit of the plaintiffs here, being a top of their lamp-post, and state whether the arms there are suggested by the classic arm, or anything that you know of which was previously known.

A. No, it is a directly opposite arm to what you would trace from any particular style, I would say. There is no particular style that you could trace that type of arm to. It is simply a modern structural lifting arm.

Cross Examination.

Questions by Mr. PIPES:

Is it new or novel, this arm that you have just mentioned, the result of inventive genius and skill?

A. It is—

Q. The type "S" arm, is that new or novel, or the result of inventive genius and skill?

A. I cannot say that it is novel. I think it is a matter, from an engineering standpoint, of a lifting arm. As to the certain time when that type of arm

was first used, I couldn't say. But it is not an arm that you can trace to any particular period or style, because it is more of a modern type of thing.

Q. Have you ever had any of your designs patented?

A. No, I have never had any of my designs patented, not being in an engineering type of work that really called for patent. A lot of our things are patented that we sell, but I didn't happen to be the designer of these patented things.

Q. Now, comparing the two lamp-posts that are involved here, the type "S" and the city's post, with reference to the photograph of the entire post, is there any more similarity between those two posts than you ordinarily meet with in lamp-posts that you see around town here?

A. I would say so, yes, on account of the general outline.

Q. Well, isn't the general outline of all lamp-posts necessarily about the same?

A. No; no.

Q. What does a lamp-post consist of, speaking from an architectural standpoint?

A. Usually they are traced to some period or architectural type of decoration, you see.

Q. Well, it is a development of the old Grecian column, isn't it, consisting of a base and a shaft and the top? Aren't they all constructed on that general idea?

A. Yes; but the mode or the type of supporting the arms of the top is generally worked out to some form

of period ornament, the same as in this other sketch I notice here. They would have the sweep of the old classic arm, where the position of the arms were somewhat similar; but it is an entirely different style.

Q. Have you had any experience outside of this store here of Mr. English?

A. Yes, sir.

Q. Well, what would you say about the appearance of these lamp-posts to the casual observer?

A. Between these two posts?

Q. Yes.

A. I would say, without studying detail on the post, the general appearance of the two would be practically the same. The only difference that I could see would be that the same motive, or same general form or outline, one was worked in the square and the other in the round.

Q. That would not make any difference in the appearance of the finished post, would it, the fact that one was square and one was round?

A. From a flat elevation, it would not, no.

Q. Well, now, would a purchaser that wanted to buy a lamp-post be deceived by the city's lamp-post here—take that for a representation of the plaintiff's post—would he be likely to?

A. From these two drawings?

Q. Well, I am not talking about the drawings. From looking at the posts themselves?

A. From a flat elevation of the post, I would say Yes, because the outline is practically the same.

Q. If you were commissioned by the City of Port-

land, or any other city, to buy lamp-posts, and would examine these two posts—

A. Yes, sir.

Q. Couldn't you tell one from the other?

A. Yes, sir.

Q. If you had at some time prior to the time seen the plaintiffs' type "S" post, could you be deceived by having this post sold to you as the plaintiffs' post?

A. I could hardly say. I might for one reason of the general form of the thing being absolutely the same, and as to whether they were round or square, that was the only difference that I can see between the two.

Q. Which is the most artistic of these posts, in your opinion?

A. Well, they are both about the same character. Plff. rests.

Deposition of G. D. Dunklin, taken as a witness on behalf of defendants, pursuant to stipulation:

I reside at 330 W. Navarre, South Bend, Indiana.

I am sales engineer for the George Cutter Company. I have worked for this company since June, 1907, that is, I worked during the vacations while I was in college, and I have been with them continuously since June, 1910.

I am familiar with the type and design of lamp post manufactured by said company, particular the post known as the Five-Light "Boulevard Post." This post has been manufactured by the George Cutter Co. since October 15, 1910.

Exhibit A hereto attached is taken from a pamph-

let published and distributed by said company. It is designated as "Boulevard" in the catalogue No. 1121.

About forty thousand of these pamphlets have been distributed throughout the United States and Canada.

This five-light Boulevard lamp post has been advertised and described and shown in the catalogues and pamphlets of said company since August, 1910.

Since October 15, 1910, these lamp posts have been installed at: Jasper, Alabama; Middletown, Kentucky; Tallhassa, Florida, and many other places.

This boulevard lamp post is not patented.

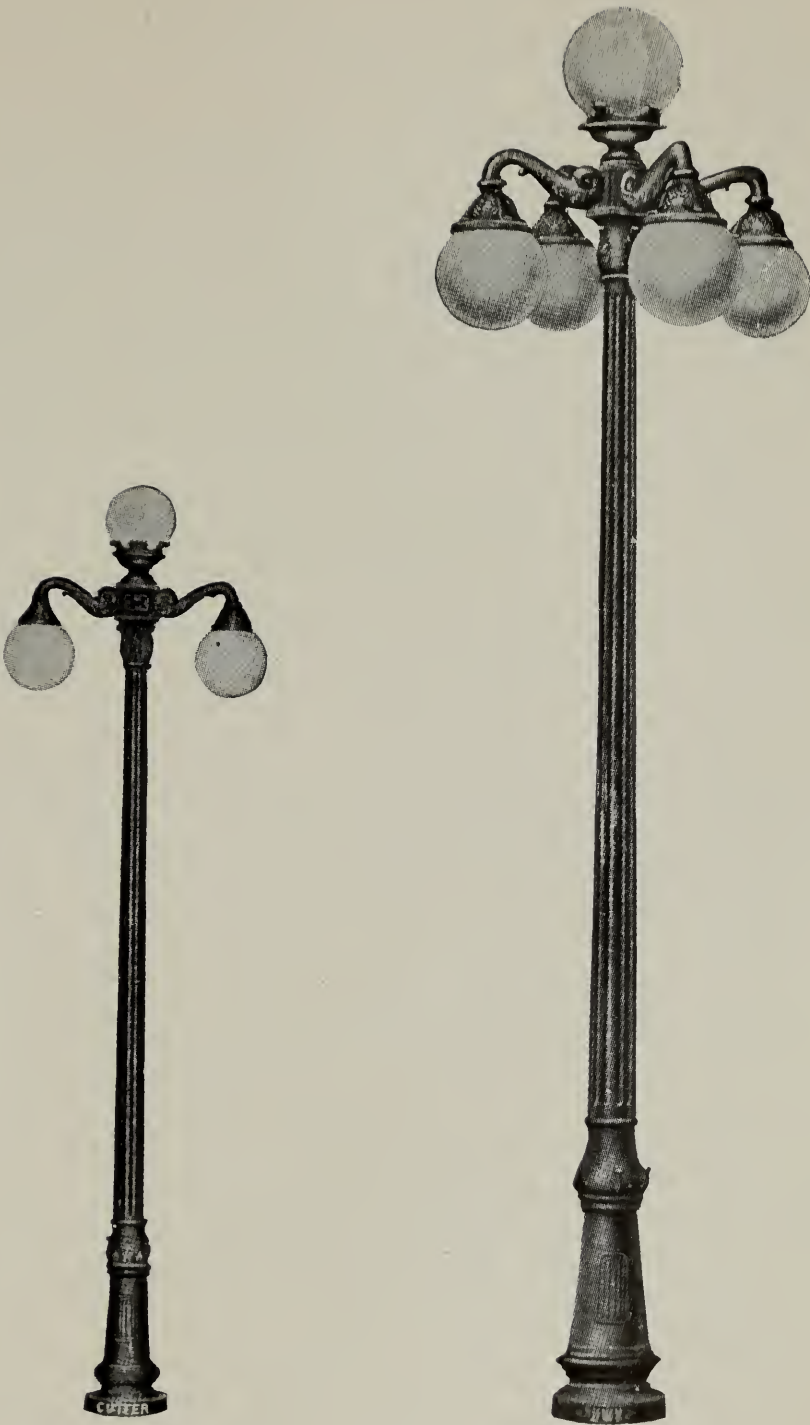


EXHIBIT "A"

Referred to in deposition of G. D. Dunklin.

The foregoing statement of evidence allowed as the statement of evidence on appeal in this cause.

CHAS. E. WOLVERTON,

Judge.

Filed July 7, 1914.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 11 day of August, 1913, there was duly filed in said Court, an Opinion, in words and figures as follows, to wit:

[Opinion of the Court.]

In the District Court of the United States for the District of Oregon.

No. 5865.

CHARLES EDWARD GRELLE and THE INDEPENDENT FOUNDRY CO., a Corporation,
Plaintiffs,

v.

THE CITY OF EUGENE, OREGON, and M. F. GRIGGS,

Defendants.

No. 5853.

CHARLES EDWARD GRELLE and THE INDEPENDENT FOUNDRY CO., a Corporation,
Plaintiffs,

v.

ROBERT E. GROSS, WM. J. GROSS, and FRANK L. GROSS, Co-Partners doing business under the firm name and style of GROSS BROS. IRON WORKS,

Defendants.

T. J. Geisler for Plaintiffs.

G. F. Skipworth, John M. Pipes and George A. Pipes, for Defendants.

Wolverton, District Judge:

The plaintiff Charles Edward Grelle invented and had patented an ornamental design for a lamp-post, the patent bearing date March 12, 1912. The application therefor was filed in the Patent Office January 2nd preceding. In December prior to such application, the defendant City of Eugene let a contract to Gross Bros., of that place, for the manufacture of certain lamp-posts designed by Alvin Meyers, who was the Superintendent of the Water Board of the City. Prior to letting the contract, the plans and specifications of the Meyers lamp-post were submitted to Grelle, or rather to The Independent Foundry Co., of which Grelle is President, for bids on the manufacture and construction of such posts, and the Foundry Company submitted its bid. Gross Bros. were the successful bidders and were awarded the contract, although the Foundry Company's bid was lower than theirs. Gross Bros. thereupon entered upon the fulfillment of the contract with the city. Later, to wit, on January 11, 1912, Grelle notified both the City of Eugene and Gross Bros. that the lamp-posts being manufactured for the city were in essential design the same as his lamp-post, and that he had applied for a patent on his design; and further indicated that if he procured a patent he would protect his rights against infringement. Still later, and shortly after the patent had issued, Grelle gave notice of such issuance,

and requested that proper arrangements be made with the owner or his attorney for obtaining a license for the use of such design. Neither the city nor Gross Bros. taking any note of such notice, Grelle and The Independent Foundry Co. instituted two suits, one against each of these parties, to enjoin an infringement of the Grelle patent. The two causes have been tried together. It may be further noted that Meyers in devising the lamp-post for the city had before him a photograph of the Grelle post, which has been designated at the trial as type "S," and obtained and adopted some ideas from the type "S" post in working out his own design.

Both designs of lamp-posts consist of a base, a fluted cylindrical column diminishing at the top, a shoulder or head from which four arms extend, and a single light with globe at the top. The four arms extend from the head or shoulder at an angle of forty-five degrees, more or less, and curve downward at the outer ends, from which the lamps with globes are suspended, so that the lamps with the extremities of the arms hang perpendicular. The base of the type "S" post is cylindrical and fluted, having a cap at the top also cylindrical, upon which rests the column. At the base of the column above the cap is a mold for ornamental effect. At the top of the column is a cap with molding underneath, upon which rests the shoulder or head, and on top of that is another cap, and above that is extended the single light. Both of the upper caps and the shoulder or head are cylindrical. The arms are also cylindrical and fluted,

broadening at the base, and so shaped as to fit the shoulder.

The base of the city's post is square in form, with paneling for ornamental appearance. At the top of this is a cap, which is also square, above which rests the column. It has a cap at the top of the column, the same as the type "S" post, but this cap is square in form. The shoulder or head is also square, and the cap above that is square. The arms are also square, with panel ornamentation, and the curves at the outer extremities drop a little more abruptly than those of the type "S" pattern. Y. D. Hensill, a witness for the defendants, describes the distinguishing features of the two posts quite clearly and accurately as follows:

"The type "S" post has a round base, with more moldings than the city's post. The type "S" post has a fluted base. The city's post is square, with a square sunk panel. The type "S" post is more ornate at the base of the shaft than the city's post. Both posts have fluted columns. Type "S" post has a round cap or head. The city's post has a square, with sunk panels. The type "S" post is ornamental. There is a difference in the shape of the arms. One is round—the type "S" post is round, increasing to elliptical, while the city post, the city arms are square, with a square panel, or with a sunk panel shaped similar to the outline of the arm."

The only question which I deem it necessary to pass upon under the view I take of the cases is, whether the city's post is an infringement upon the type "S"

post. The leading case upon the subject, and one which has been followed since, is

Gorham Company v. White,
14 Wallace 511.

The test in ornamental designs, where brought into contrast, one with another, for the purpose of determining whether infringement has taken place, is the sameness of effect upon the eye, whether there exists substantial identity of design. Nor need it be that the observer shall be an expert in the particular art of which the design is a part, but he may be the ordinary observer in common affairs, the ultimate inquiry being whether such an observer is likely to be misled or deceived into buying one for the other without distinguishing the difference between them. "We hold, therefore," says the court (P. 528), "that if, in the eye of an ordinary observer, giving such attention as a purchaser usually gives, two designs are substantially the same, if the resemblance is such as to deceive such an observer, inducing him to purchase one supposing it to be the other, the first one patented is infringed by the other."

The designs should be viewed as wholes, considering their general appearance as they present themselves to the eye of the observer, without special attention to minutiae of detail or ornamentation. See further

Hutter v. Broome,

114 Federal 655;

Graff, Washbourne & Dunn v. Webster,

189 Federal 902;

S. C. 195 Federal 522.

Observing this rule, I am firmly impressed that there has been no infringement of the type "S" post by the defendants in the manufacture and use of the city's post. The only parts of the two posts that bear marked similarity are the columns and the arms in their general longitudinal contour and declination to the shoulders of the posts, and even as to these latter, the arms on the city's post at the outer extremity drop more abruptly, as has been previously observed, than the type "S" design. The base of the city's post is square, and the cap thereon is square, while the base of the type "S" post is cylindrical and fluted and the cap is round. The cap at the top of the column of the city's post is square, the shoulder is square, and the cap above it is square. All these in the type "S" post are round or cylindrical. The arms of the city's post are square and paneled, while those of the type "S" post are cylindrical and fluted. To the eye of the casual observer these marked distinguishing features could scarcely escape ready detection, and the probability that the general purchaser would be misled or deceived in buying one of these posts for the other is very remote.

The plaintiff has introduced comparative drafts of the mere outlines of the two posts, which drafts it must be admitted present great similarity, and one cannot be readily distinguished from the other without giving particular attention to detail. But this cannot be a safe test. It is the constructed post as it appears to the eye of the ordinary or casual observer, and when so viewed the two posts are readily distin-

guishable. The city's post runs predominantly in square surfaces, while cylindrical surfaces predominate in type "S," features that must catch the eye instantly and distinguish the one from the other.

These considerations lead to a dismissal of both causes, and such will be the decree of the court.

[Endorsed]: Opinion. Filed Aug. 11, 1913.

A. M. CANNON,
Clerk.

And afterwards, to wit, on Monday, the 11 day of August, 1913, the same being the 31 Judicial day of the Regular July, 1913, Term of said Court; Present: the Honorable CHAS. E. WOLVERTON, United States District Judge presiding, the following proceedings were had in said cause, to-wit:

[Decree.]

*In the District Court of the United States for the
District of Oregon.*

No. 5865.

CHARLES EDWARD GRELLE and THE INDEPENDENT FOUNDRY CO.,

v.

THE CITY OF EUGENE, OREGON, and M. F. GRIGGS.

This cause was heretofore submitted to the Court upon the pleadings and the proofs herein adduced by the parties, was argued by counsel and by the Court taken under advisement and now, at this time being

fully advised the Court finds that the equities are with the defendants and that the plaintiffs are not entitled to the reliefs provided for in the complaint;

Now, therefore, it is Ordered, Adjudged and Decreed that the Bill of Complaint be and the same hereby is dismissed, and that the defendants have and recover of and from the plaintiffs costs and disbursements herein taxed at \$140.75.

And afterwards, to wit, on the 5 day of February, 1914, there was duly filed in said Court, a Petition for Appeal, in words and figures as follows, to wit:

[Petition and Order for Appeal.]

*"In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE and INDEPEND-
ENT FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F.
GRIGGS,

Defendants.

The above named plaintiffs, conceiving themselves aggrieved by the findings and conclusions of the Court in the above named case, and the decree thereon entered in the above entitled case August 11, 1913, hereby appeal from said decree to the United States Circuit Court of Appeals for the 9th Circuit, and they pray that this appeal may be allowed and that a transcript of the records and proceedings of said district

court on which said decree is founded may be sent, duly authenticated, to said Circuit Court of Appeals.

Dated February 5th, 1914.

INDEPENDENT FOUNDRY CO.

By C. E. Grelle,
President.

C. E. GRELLE,
Plaintiffs.

Of Counsel for Plaintiffs.

And now it is ordered that the appeal above prayed for be allowed.

CHAS E. WOLVERTON,
District Judge.

Dated, February 5th, 1914.

[Endorsed]: Appeal. Filed Feb. 5, 1914.

A. M. CANNON,
Clerk.

By F. L. BUCK,
Deputy.

And afterwards, to wit, on the 5 day of February, 1914, there was duly filed in said Court, Assignments of Error, in words and figures as follows, to wit:

[Assignments of Error.]

*"In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE and INDEPENDENT FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F.
GRIGGS,

Defendants.

The above named plaintiffs, having appealed to the United States Circuit Court of Appeals for the 9th District from the decree entered in the above named case August 11, 1913, do hereby assign the following as the Errors committed therein, towit:

I.

The District Court erred in finding that the lamp post erected and used by defendants in said City of Eugene, Oregon, did not infringe upon the design patents of plaintiffs.

II.

The District Court erred in ruling (as in substance stated in the Court's opinion) that while the designs of the plaintiffs' and the defendants' lamp post should be viewed as wholes without special attention to minutiae of detail or ornamentation, and while the outlines of said post present great similarity, and one cannot readily be distinguished from the other without giving particular attention to detail, never theless this is not a safe test, because the defendants' post runs predominantly in square surfaces while the cylindrical surfaces prevail in the plaintiffs' post, and therefore the defendants' post is distinguished from, and does not infringe upon the plaintiffs' patented post, and the bill of complaint is without equity and must be dismissed.

III.

The District Court erred in not finding that the de-

fendants' lamp post does infringe the design patent of plaintiffs set forth in the bill of complaint herein.

IV.

The District Court erred in dismissing the bill of complaint herein without granting the plaintiffs any relief.

V.

The District Court erred in not granting to plaintiffs the injunction and the other relief prayed for in their bill of complaint herein

Dated, February 5, 1914.

T. J. GEISLER,
Attorney and Counsel
for Plaintiffs.

[Endorsed]: Assignments of Error. Filed Feb. 5, 1914.

A. M. CANNON,
Clerk.
By F. L. BUCK,
Deputy.

And afterwards, to wit, on the 5th day of February, 1914, there was duly filed in said Court, a Bond on Appeal, in words and figures as follows, to wit:

[Bond on Appeal.]

*In the District Court of the United States for the
District of Oregon.*

CHAS. E. GRELLE and INDEPENDENT FOUN-
DRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, OREGON, and M. F.
GRIGGS,

Defendants.

KNOW ALL MEN BY THESE PRESENTS,
That we, Chas. E. Grelle and Independent Foundry
Co., a corpo and W. H. Warren, of Portland, Oregon,
surety, are held and firmly bound unto the above
named defendants in the sum of five hundred dollars,
to be paid to the said defendants or their legal repre-
sentatives, executors or administrators. To which
payment, well and truly to be made, we bind ourselves,
and each of us, jointly and severally, and our and each
of our heirs, executors and administrators, firmly by
these presents.

Sealed with our seals, and dated Feby. 5, 1914.

Whereas the above named plaintiffs have appealed
to the United States Circuit Court of Appeals for the
Ninth Circuit, to reverse the decree in the above en-
titled cause by the District Court of the United States
for the District of Oregon.

Now, therefore, the condition of this obligation is
such, that if the above named plaintiffs shall prosecute
said appeal to effect, and answer all costs if he shall
make good their plea, than this obligation shall be
void; otherwise to remain in full force and virtue.

INDEPENDENT FOUNDRY CO.

By C. E. Grelle, Pres.

C. E. GRELLE

W. H. WARREN

Signed, sealed and delivered in presence of

UNITED STATES OF AMERICA,

District of Oregon,—ss.

I, W. H. Warren, of Portland, Oregon, being duly sworn, depose and say that I am one of the sureties in the foregoing bond, that I am a resident and freeholder within said District, and that I am worth, in property situated therein, the sum of five hundred dollars, over and above all my just debts and liabilities, exclusive of property exempt from execution.

W. H. WARREN.

Subscribed and sworn to before me this Feby. 5, 1914.

CECIL DONG,

Notary Public for Oregon.

I hereby approve of this bond Feby. 5th, 1914.

CHAS. E. WOLVERTON,

District Judge.

[Endorsed]: Bond on Appeal. Filed Feb. 5, 1914.

A. M. CANNON,

Clerk.

By F. L. BUCK,

Deputy Clerk.

And afterwards, to wit, on the 9 day of February, 1914, there was duly filed in said Court, a Stipulation, in words and figures as follows, to wit:

[Stipulation for Cause to be Heard at Portland.]

*In the District Court of the United States for the
District of Oregon.*

CHARLES EDWARD GRELLE and THE INDE-

PENDENT FOUNDRY CO., a corporation,
Plaintiffs,

vs.

THE CITY OF EUGENE, and M. F. GRIGGS,
Defendants.

It is hereby stipulated between the attorneys of the above named parties, that this appeal shall be heard at the annual term of the United States Circuit Court of Appeals of the 9th Judicial District, held in the City of Portland, District of Oregon, in 1914. And the defendants, respondents, hereby enter their appearance in this case.

Dated, February 7, 1914.

T. J. GEISLER,

Counsel for Plaintiffs-Appellants.

JOHN M. PIPES,

Of Counsel for Defendants-Respondents.

Filed Feb. 9, 1914.

A. M. CANNON,

Clerk U. S. District Court.

And afterwards, to wit, on the 8 day of July, 1914, there was duly filed in said Court, a Citation on Appeal, in words and figures as follows, to wit:

[Citation on Appeal.]

UNITED STATES OF AMERICA,

District of Oregon,—ss.

To The City of Eugene and M. F. Griggs, Greeting:
WHEREAS, Chas. Edward Grelle and Independent Foundry Co., a corporation, have lately appealed to the United States Circuit Court of Appeals for the

Ninth Circuit from a decree rendered in the District Court of the United States for the District of Oregon, in your favor, and has given the security required by law;

YOU ARE, therefore, hereby, cited and admonished to be and appear before said United States Circuit Court of Appeals for the Ninth Circuit, at San Francisco, California, within thirty days from the date hereof, to show cause, if any there be, why the said decree should not be corrected, and speedy justice should not be done to the parties in that behalf.

GIVEN under my hand, at Portland, in said District, this 8th day of July in the year of our Lord, one thousand, nine hundred and fourteen.

CHAS. E. WOLVERTON,

Judge.

Due service of the within Citation is hereby admitted this 8th day of July, 1914.

JOHN M. PIPES,

of Attorneys for Defendants-Respondents.

[Endorsed]: Citation on Appeal. Filed July 8, 1914.

A. M. CANNON,

Clerk.

